San Luis Rey, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWANO, INC.,	)	
	)	
Respondent,	)	Case Nos. 77-CE-28-X
	)	77-CE-28-A-X
and	)	77-CE-42-X
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	7 ALRB No. 16
	)	

DECISION AND ORDER

On January 7, 1980, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent and General Counsel each timely filed exceptions, a supporting brief, and a reply brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the rulings,[1/] findings, and conclusions of the ALO and to

---

[1/] We reject any implication in the ALO's Decision that intent is , necessary element of surveillance. Employer surveillance of an employee's protected activity violates section 1153(a) when such :conduct tends to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed by section 1152 if the Act. Sunnyside Nurseries, Inc. (Sept. 11, 1980) 6 ALRB No. 52; Merzoian Brothers Farm Management, Inc. (July 29, 1977) 3 ALRB No. 62; NLRB v. Aero Corporation (5th Cir. 1978) 581 F.2d 511 [92. LRRM 1287]. See Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13.

adopt his recommended Order,[2/] as modified herein.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Kawano, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined by Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive collective bargaining representative of Respondent's agricultural employees, by: (1) unilaterally changing employees' wages or working conditions; (2) failing or refusing to furnish information relevant to collective bargaining at the UFW's request; or (3) failing or refusing to bargain regarding wages and working conditions of its office clerical employees.

(b) Interfering with the right of its employees to communicate freely with and receive information from the UFW or any other labor organization at their dwellings located on Respondent's premises.

(c) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are

[2/]In light of special circumstances present herein, we have modified the ALO's Recommended Order to allow the Regional Director to direct a radio broadcast of the Notice to Employees in the event former employees cannot be reached by mail. See, Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104.

deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees and if an agreement is reached, sign a written contract incorporating that agreement, at the request of the UFW.

(b) Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time during the period from June 29, 1977, to the date on which Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses they have incurred as a result of Respondent's refusal to bargain, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios (1978) 4 ALRB No. 24, plus interest computed at 7 percent per annum.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(d) Sign the Notice to Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice in conspicuous places on its property for a 60-day period, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has

been altered, defaced, covered or removed.

(f) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees referred to in Paragraph 2(b) above and to all employees employed during the payroll period immediately preceding June 29, 1977. If the Regional Director determines that Respondent does not maintain adequate addresses of former employees and that mailing the Notice would therefore be inappropriate, he may at his discretion, direct Respondent to arrange for the Notice to be broadcast in all appropriate languages on a radio station in the southern San Diego county area, once a week for four weeks during Respondent's next peak hiring season. The station and the times of the broadcasts shall be determined by the Regional Director.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to the assembled employees of Respondent on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate

them for time lost at this reading and the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative for Respondent's agricultural employees, be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: July 9, 1981

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Regional Office, the General Counsel of the Agricultural Labor Relations Board, issued a complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to try to get a contract or to help or protect one another; and
6. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on your behalf over working conditions.

WE WILL NOT make any change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL permit UFW representatives to come onto property under our control in motor vehicles to visit and communicate with you at your dwellings during nonworking hours.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining agreement. In addition, we will reimburse all workers who were employed at any time during the period from June 29, 1977, to the date we begin to bargain in good faith for a contract, for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.

Dated: KAWANO, INC.

By: _____
Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1350 Front Street, Room 2056, San Diego California 92101. The telephone number is (714) 237-7100.

This an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Kawano, Inc. (UFW) 7 ALRB No. 16
Case Nos. 77-CE-28/28-A/42-X

ALO DECISION

The ALO concluded that Respondent violated section 1153(e) and (a) commencing on June 29, 1977, by its: (1) failure to provide the UFW with various requested data relevant to collective bargaining; (2) denial of access to UFW agents under the terms of a negotiated access agreement; (3) restricting or preventing UFW agents from taking vehicular access to employees' residences on company property; (4) refusal to bargain concerning clerical employees in the bargaining unit; and (5) unilateral increase in piece rate of tomato packers. Respondent independently violated section 1153(a) by denying UFW agents vehicular access to areas of its ranches where employees resided.

BOARD DECISION

The Board affirmed the ALO's findings and his conclusion that Respondent violated section 1153(e) and (a) and section 1153(a) by engaging in the acts and conduct described above.

REMEDY

The Board ordered Respondent to cease and desist from failing or refusing to bargain collectively in good faith with the UFW, from unilaterally changing employees' wages or working conditions, from failing or refusing to furnish information relevant to collective bargaining, from failing or refusing to bargain regarding the wages and working conditions of its office clerical employees, and from interfering with the right of its agricultural employees to communicate freely with and receive information from the UFW or any other labor organization at their dwellings located on Respondent's premises. In addition, Respondent was ordered to meet and bargain collectively in good faith with the UFW, at the UFW's request, and to make whole all its agricultural employees who were employed at any time during the period from June 29, 1977, to the date it begins to bargain in good faith for a contract, for all losses of pay and other economic losses they have sustained as the result of Respondent's refusal to bargain in good faith. The usual reading, posting, and mailing of a Notice to Employees were also ordered. The Order permits the Regional Director to direct Respondent to arrange for a radio broadcast of the Notice to Employees in the event he determines that Respondent does not maintain adequate addresses of its former employees and that nailing the Notice would be inappropriate. Finally, the Board extended the UFW's certification for a one-year period commencing on the date on which Respondent commences to bargain in good faith.

* * *

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

KAWANO, INC. Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	)	Case Nos. 77-CE-28-X 77-CE-28-1-X 77-CE-42-X

APPEARANCES:

Thomas A. Nassif, Esquire
Sturdevant, Nassif & Pinney
P. O. Box 710
444 South Eighth Street
El Centro, California 92243
On Behalf of Respondent

Edwin F. Lowry and Philip Kruger, Esquires
915 Capitol Mall
Sacramento, California 95814

and

Jorge Carrillo
General Counsel
1350 Front Street, Room 2056
San Diego, California 92101

On Behalf of the Agricultural Labor
Relations Board

DECISION

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: This case was

heard before me in San Diego, California, commencing October 23, 1978, and concluding January 8, 1979. There were 26 days of hearing.

Charges were filed against Kawano, Inc., in Case No. 77-CE-28-X on December 2, 1977; an amended charge, captioned 77-CE-28-1X, was filed January 19, 1978. On December 22, 1977, an additional charge was filed naming Kawano, Inc., Josiah L. Neeper, David B. Geerdes, and Gray, Gary, Antes & Frye as Respondents. Notice of hearing and consolidated complaint as well as an order consolidating the cases for hearing issued on August 22, 1978. On October 9, 1978, a first amended complaint issued. The charges, the complaint and the first amended complaint were duly served upon Respondents.

Respondent Kawano, Inc., answered the complaint on August 31, 1978. The remaining Respondents answered the first amended complaint on October 19, 1978. On October 22, 1978, the first amended complaint was dismissed as to Respondents Gray, Gary, Ames & Frye, Josiah Neeper and David Geerdes. Kawano, Inc., remains as the sole Respondent.

Kawano is charged with violations of Labor Code Sections 1153 (a) and (e), Section 1155.2 (a), and Sections 1153 (c) and (d) of the Act.

As Charging Party, the United Farm Workers of America (UFW) moved to intervene in the proceedings. The motion was granted without opposition. At the close of the hearing extensive briefs were filed by the General Counsel and by Respondent.[1/] Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Kawano, Inc., is a corporation engaged in agriculture in San Diego County, California, within the meaning of Labor Code Section 1140.4 (a) , and is an agricultural employer within the meaning of Section 1140.4 (c). The Agricultural Labor Relations Board has, on several prior occasions, asserted jurisdiction over Respondent's operations.[2/]

The UFW is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning

---

[1/]The brief filed by the General Counsel consisted of 379 pages. The brief filed by Respondent was not consecutively paged. It appears to be of approximately the same length.

[2/]Kawano. Inc., 3 ALRB No. 25 (1977); Kawano. Inc. 3 ALRB No. 54 (1977); Kawano. Inc., 4 ALRB No. 104 (1978).

of Labor Code Section 1140.4(b).

II. Respondent's Operations

During 1977 and 1978 Kawano farmed four separate San Diego County properties: Ivey, Bonsall, Rancho Santa Fe and San Luis Rey. Its principal crop during this period was round (pole) tomatoes. It also grew cherry tomatoes, cauliflower, avacados and strawberries.

Respondent's offices are located at Sun Luis Rey Ranch in a building which also houses a tomato packing operation which since June, 1978, has been used solely to pack tomatoes grown by Kawano. The shed is operated by a separate corporation known as Pacific Beauty Packing Company, Inc.[3/] Respondent's entire crop of round tomatotes is packed in the Pacific Beauty shed. Prior to June 1978, Pacific Beauty also packed tomatoes for two independent growers-Vega Brothers and Pacific View Farms, a/k/a Stickles.

Respondent's cherry tomato and cauliflower crops are packed in a shed other than the round tomato shed. Strawberries are field-packed.

There is little or no interchange between tomato shed workers and the employees who pack cauliflower and cherry tomatoes, the latter group consists primarily of Kawano field workers assigned to pack the two crops. While Respondent, prior to June, 1978, contended, with regard to the cauliflower or cherry tomato packing. Respondent has at all times regarded such employees as agricultural employees and within the unit for which the UFW was certified.

Pacific Beauty functions as the sale arm of Kawano. Fred Williamson, an officer and shareholder in Pacific Beauty, performs these services.[4/]

III. The Unfair Labor Practices

A. Failure And Refusal To Bargain.

Respondent is charged with multiple refusals to bargain and is also charged with not bargaining in good faith, i.e., engaging in surface bargaining. The findings and conclusions with respect to each allegation are separately set forth below.

1. Failure to Bargain In Good Faith:

Paragraph 10(a) of the first amended complaint charges Respondent with engaging in surface bargaining by negotiating

---

[3/] The status of Pacific Beauty and Kawano as a common employer is discussed below.

[4/] Particular aspects of Respondent's operations are discussed in more detail below in connection with specific allegations in the complaint.

with no intention to reach a contract as evidenced specifically in having made proposals which could not be accepted by the UFW, in refusing to make meaningful concessions for more than a year following the UFW's certification, and in attempting to undermine support of the Union by engaging in various acts charged as refusals to bargain or as violations of Section 1153 (c).[5/] With respect to the allegations of Paragraph 10 (a), I make the following "Findings of Fact."

March 16-June 29, 1977: On March 16, 1977, the UFW was certified as bargaining representative for a unit of "AIL agricultural employees of Kawano Farms, Inc." On April 7, 1977, Gilbert Padilla, Secretary-Treasurer of the UFW, sent Kawano Farms, Inc., a written request to begin, negotiations, Padilla's letter was accompanied by the Union's standard "Request for Information" and by the Union's standard initial proposals covering non-economic items.

On May 3, David Geerdes, Respondent's attorney, wrote Padilla that he had taken steps to gather such information as was available and which he regarded as "obviously relevant to negotiations." He said the information was contained in voluminous records which were available for the UFW's inspection and/or duplication. He noted that if the UFW desired copies of any records, the Company would provide an estimate of the cost involved. Geerdes said he did not understand the relevance of some of the requested information, and suggested discussing the matter at the initial bargaining session. He also asked to be contacted regarding a date for this first meeting.

By letter of May 20, Padilla directed Geerdes to contact Alex Beauchamp, the UFW negotiator assigned to the Kawano negotiations, for a meeting date. On May 24 Geerdes wrote Beauchamp, enclosing copies of his correspondence with Padilla, to ask how Beauchamp wished to proceed and when he would like the first meeting.

Beauchamp tried unsuccessfully on June 6, 7 and 17 to reach Geerdes by telephone. On June 20, an associate of Geerdes wrote Beauchamp acknowledging his call of the 17th, explaining that Geerdes was away from the office and proposing June 29 as the date for the initial meeting. Beauchamp telephoned his acceptance of the proposed date.

On June 23, Beauchamp responded to Geerdes' May 3 letter to Padilla regarding the "Request for Information."[6/] He asserted that the information requested was relevant and necessary to enable the UFW to bargain intelligently; that the UFW asked only that the data available be supplied "... in the form or manner it is presently available to the company. We are not requesting that the company go through voluminous records and compile the data in a particular form." Beauchamp asserted Respondent was obliged to furnish the material without cost; but if it refused to do so, he wanted a

---

[5/] The first amended complaint, which is the operative pleading, will be referred to hereafter as the complaint.

[6/] Hereinafter referred to as "Request."

detailed statement regarding the cost of copying the data.

Meeting No. 1--June 29, 1977: On June 29, 1977, at the offices of Kawano's lawyers, Gray, Gary, Ames & Frye, the first of 28 meetings was held. It was devoted primarily to Geerdes' response to the UFW's "Request for Information." There was no discussion of the contract proposals previously submitted by the UFW.

The UFW's contract ratification procedure was discussed as was the UFW's desire that a Kawano be present during the bargaining sessions, Geerdes having appeared by himself at the opening session. Beauchamp wanted a ranch tour in order to facilitate his understanding of problems which would arise during the course of bargaining. Respondent agreed to arrange a tour.

The UFW said it needed access to Kawano's properties to talk to employees living there and to distribute literature to them regarding the UFW. The Union sought an interim agreement covering access.

Questions were also raised about Respondent's refusal to rehire a group of employees, including negotiating committee members, laid off at the end of the 1975 season.[7/] The members of the Union's negotiating committee were told to show up at the ranch; Geerdes said they would be hired if additional workers were needed. He explained it was the Kawano policy to hire those who were at the ranch site when additional workers were needed.

The meeting was adjourned by mutual agreement, and July 15 was set as the date for the next meeting. Beauchamp testified the meeting came to a natural end and was short because it was a preliminary meeting.

June 30-July 15: During the interval between the first and second meetings there was an exchange of correspondence, initiated by Geerdes, regarding access. Geerdes wanted to know what limits, if any, the UFW was proposing with respect to numbers taking access and the duration of access. He wanted the Union proposal reduced to writing. Beauchamp responded that Geerdes was stalling. Geerdes replied in a hand-delivered letter that Kawano would not agree to unlimited access. Beauchamp and Geerdes discussed access immediately prior to the second bargaining session on the 15th. They also discussed an incident in which one of the UFW representatives seeking access was alleged to have had a gun.

Meeting No. 2--July 15, 1977: Beauchamp again requested that a Kawano be present at the bargaining sessions. Geerdes said if he found it necessary, he would have someone present and anticipated that such would be the situation at some future date. Beauchamp asserted that the absence of a Kawano would delay negotiations. Geerdes acknowledged understanding of Beauchamp's position. He said that when growing season pressures eased up perhaps a Kawano would attend.

[7/] See Kawano. Inc., 4 ALRB No. 104 (1978).

A discussion of Kawano's hiring practice was triggered by Beauchamp's account of having accompanied workers to the Kawano office and having been told that only John Kawano did the hiring. Geerdes explained the procedure: John Kawano determines how many people are to be hired; he communicates this decision to his field foremen who then hire the allotted number from among those at the ranch site seeking work.[8/] Geerdes said Kawano was unavailable the day Beauchamp and the workers visited the office. He said John Kawano had directed him to offer jobs to the individuals when Beauchamp had accompanied to the office. Beauchamp expressed dissatisfaction with this hiring procedure; he contended it worked a hardship on workers by requiring a daily trip from Mexico to the ranch site. He said the current procedure was new, and that the former practice had not required a daily show-up; that workers who showed up on days when no new workers were needed were told approximately when work would be available and how many workers would be hired. Geerdes denied there had been any change in hiring procedures.[9/]

Geerdes stated Kawano agreed to a ranch tour by UFW representatives and proposed July 23 as a date for such a tour.

Geerdes submitted an interim access proposal for discussion. It paralleled the ALRB's access regulation. Beauchamp responded by arguing the UFW had an unlimited right to visit the workers who lived on the premises. There was discussion of the time limitations on access proposed by Geerdes; of permitting access during the workers' 10-minute break periods; of the numbers to be permitted to be on the premises at any one time; of the need for prior notification that access was to be taken; and of the location on a ranch at which the UFW could meet and confer with the workers; i.e., whether at a designated area or wherever the workers were located. Geerdes said he would rewrite the proposal and forward it to Beauchamp. He requested that no access be taken until he could enlighten Kawano's foremen regarding the agreement. Geerdes rewrote the agreement, executed it on July 18 and forwarded it to Beauchamp who executed it on July 26. It was to run through September 1, 1977.

The meeting ended by mutual agreement, and a date was set for their next meeting. There was no discussion of the Union's initial proposal.

Meeting No. 3--August 23, 1977: Beauchamp related problems which he and members of the committee had experienced with Kawano supervisors regarding access. Geerdes promised to investigate the complaints. Beauchamp again raised questions about the hiring procedures and said it was frustrating for workers to drive to Oceanside only to be told there was no work. He wanted Kawano to notify the UFW when work was available so it could provide workers. Geerdes responded by restating Kawano's hiring procedures.

[8/] See Kawano. Inc., 4 ALRB No. 104 (1978), at p. 3, et seq., for discussion of modification in hiring system effected in 1975.

[9/] Ibid.

Beauchamp, for the first time, suggested that the UFW's previously submitted, non-economic proposals be discussed. Geerdes stated he would have difficulty reaching agreement on any item without the UFW's economic proposal in front of him.

Beauchamp began by noting that the proposal given Kawano was the basic UFW proposal presented to all employers. He then proceeded to discuss Article 1, Recognition, and stated the article was essentially a statement of the law. Geerdes disagreed, saying the language proposed contract coverage automatically including persons in any later certified unit of Kawano employees.

Geerdes inquired whether language applying the agreement to "all agricultural joint ventures, partnerships and any other forms of agricultural business operation by and between Company shall be covered by the terms of this Agreement" was intended to cover .a partnership between Kawano and outsiders. Beauchamp's response was no. Geerdes responded that it appeared to do so.

Geerdes questioned whether the Union proposed to limit a foreman's right to free speech by its proposal that Company representatives "... will (not) take any action to disparage, denigrate or subvert the Union." Beauchamp said the paragraph's purpose was to prevent pressure being exerted on the workers by the foremen.

The UFW's Union security proposal was discussed. Geerdes asked whether it covered temporary employees. Beauchamp said it applied to everyone; that an employee working more than five days was required to join the Union as a condition of employment. The reason for this position was that some benefits are common and accumulated from employer to employer.

Geerdes asked no questions regarding the check-off proposal or the requirement that a list of current workers be supplied one week after agreement was reached. He asked about indemnification of the Employer for terminating a worker at the request of the UFW for lack of membership. Beauchamp said he was willing to discuss this problem.

When the discussion moved on to the hiring hall proposal, Ray Kawano wanted an explanation of how it would work. He suggested that the UFW could not meet his needs. Beauchamp said the UFW used radio ads and beat the bushes to meet employer requirements, and if the Union were unable to supply workers, no one else would be able to do so.

Geerdes said that if Kawano were to agree to a hiring hall, it would be advantageous to have a hall in northern San Diego County. Beauchamp said the establishment of such a hall was under discussion within the Union.

During the course or the meeting Beauchamp inquired whether the print-out he received included the packing shed. He stated the UFW considered the shed agricultural, and its employees part of the unit. Beauchamp offered no explanation for the UFW

position. He went on to state that if Kawano disagreed as to the status of shed employees, it should produce facts supporting its position. The meeting adjourned by mutual agreement.

Because of Beauchamp's intervening unavailability, September 13 was set as the date for the next meeting. Geerdes later cancelled the meeting, citing the need to prepare for an unfair labor practice trial involving Kawano and the UFW. The meeting was rescheduled for September 28.

August 23-September 28: Geerdes and Beauchamp exchanged correspondence during the interval between meetings regarding Geerdes' problem of coordinating negotiations and the Kawano unfair labor practice trial. Geerdes asked Beauchamp to join in a motion to the Administrative Law Officer seeking to continue the trial so that he might continue with negotiations. Beauchamp declined to do so; as a result, Geerdes arranged for one of his partners to take over the negotiations.

Meeting No. 4--September 28, 1977: Beauchamp opened the meeting by asserting that negotiations were proceeding too slowly and that Kawano was not allotting enough time for meetings and was not meeting frequently enough. Geerdes denied the charges, stating that the Company had not limited the time allotted for negotiations and had never stated they were unwilling to meet more often.[10/]

The discussion moved to Article 4, Seniority. Beauchamp stated the UFW philosophy called for the last hired to be the first fired. He listed the conditions under which seniority would be broken, and stated that seniority would prevail in filling vacancies or new jobs as well as in layoff and recall, that seniority would prevail with regard to promotions and that the proposal Included some "aspect of on-the-job training." The seniority discussion lasted approximately two hours.

Geerdes related Kawano's policy of reducing the work week as the season neared its end. He said that some workers would .leave Kawano to take other jobs rather than accept the shortened work week and asked whether such workers would be treated as having quit rather than having been laid off. Beauchamp said he thought some cutoff point could be established to distinguish "quits" from "layoffs."

Geerdes questioned the applicability of the seniority provision to an individual leaving the bargaining unit to become a supervisor. Beauchamp responded that the proposed provision would not apply to such persons.

Geerdes also sought to confirm his understanding that a person who had worked at Kawano during the period of the ALRB election in 1975 would be slotted into the proposed seniority list with his appropriate date of hire even though he had not worked at Kawano since 1975. Beauchamp responded that such persons would get seniority from their original data of hire.

[10/]Geerdes' assertion is consistent with the record.

Responding to a question, Beauchamp stated that classification as well as Company seniority was being proposed. He said classification seniority should pose no problems since the people within a particular classification would have been-determined by the Employer. Kawano responded that all persons within a classification might not be able to do all the tasks required of the classification.

There was a discussion of the UFW's proposal that on-the-job training be given on the basis of seniority. Kawano voiced a preference to select the individuals to whom such training would be given.

Ray Kawano stated that the Company did not have people who worked year-round as tractor drivers or truck drivers, although such individuals were year-round workers. Beauchamp said that consideration would be given to his problem.

Beauchamp wanted a response to the UFW's initial proposal. Geerdes said his practice was to refrain from making a counterproposal until he had heard an explanation of the Union's initial proposal. He also said it would be difficult to make a counterproposal until he had an economic proposal from the Union. Beauchamp responded that no economic proposal was possible without all the information requested of the Employer. Geerdes promised a counterproposal within two weeks after the UFW completed its presentation of the initial proposal.

During the course of the meeting, Josiah Neeper made an appearance and was introduced as the person taking over the negotiations as Kawano's negotiator. Neeper and Beauchamp agreed upon dates for a series of meetings.

Meeting No. 5--October 5, 1977: Neeper took over as Kawano's negotiator. The meeting was devoted to a detailed discussion of Article 5, Grievance and Arbitration. Beauchamp was impatient with the progress of negotiations. He wanted a proposal on the articles which had been discussed. Neeper said he would provide the UFW with a complete Employer response at the next meeting, noting that he understood the balance of the Union's proposal. He said the Company's ! counterproposal would be its initial position and that further movement was possible. At Beauchamp's suggestion, the meeting adjourned with the parties agreeing to meet on October 12.

Meeting No. 6--October 12: As promised, Neeper presented an Employer response to the Union's initial proposal except as to a grievance and arbitration provision. Neeper said he had insufficient time to prepare a response on this point. Beauchamp requested that Neeper proceed through his proposal article by article, noting the modifications he had made in the UFW's proposal.

Kawano proposed limiting the scope of the recognition clause to the unit for which the UFW had been certified. Its proposal did not include shed employees because they did not vote in the election. Nor did Respondent propose automatic coverage of employees working at any after-acquired properties or for any entity

other than Kawano, except as required by the existing certification.

Kawano proposed that neither the Union nor the Company interfere with an employee's ALRB rights and that they jointly make known to employees that each would be treated equally irrespective of Union membership. Kawano also proposed that the Union language regarding denigration of the Union be modified to provide that UFW representatives would not denigrate the Employer.

Kawano's Union security proposal was limited to proposing maintenance of membership with an annual 30-day withdrawal period. Expressing concern about liability for discharging an employee for failure to pay dues, Kawano proposed that it have the right to go to arbitration if it had questions regarding such a discharge. It also proposed indemnification for any damages incurred as the result of complying with the UFW's request to discharge an employee for failing to acquire or maintain good-standing membership.

Kawano agreed to supply a current list of employee names, addresses, S.S.A. numbers and classifications within a month after execution of the agreement rather than within a week as proposed by the UFW.

In Article 3, Kawano proposed optional rather than mandatory use of the UFW hiring hall. Respondent's seniority proposal gave effect to seniority only in the limited and unlikely situation of "ability, qualifications, fitness, aptitude, reliability and efficiency (being) substantially equal in the good faith opinion of management."

Kawano proposed that a just cause limitation on discipline apply only to workers employed more than 90 days and that the "just cause" limitation be restricted to suspensions and discharges as opposed to any form of discipline.

Kawano proposed that UFW access to its properties be limited to what was required by the ALRA.

On the subject of "New or Changed Jobs" (Article 8), there was discussion of whether Kawano's proposal would apply to all new jobs or only those which were contemplated to be permanent. It was intended to be limited to permanent jobs. Respondent proposed limiting arbitration in this area to unresolved differences about the rate for the new job and that mutual agreement to submit to arbitration be required. Absent agreement to submit to arbitration, the parties would be free to exercise their statutory rights. Beauchamp did not inquire what Kawano meant by "statutory rights." Kawano proposed that the rate for any new or changed job be operative as of the date of an arbitrator's award or the date a dispute regarding the rate was otherwise resolved. The UFW had proposed the new rate be retroactive to the date work commenced in the new classification.

Kawano proposed that the granting of leaves of absence be discretionary rather than mandatory (Article 9).
//

Respondent agreed with the principle of a maintenance of standards clause, but proposed that the scope of the clause be limited to certain specified working conditions to be listed in the contract (Article 10).

In responding to Article 11, "Supervisors and Bargaining Unit Work," Kawano proposed that supervisors be permitted to continue doing the work they were currently doing and, more significantly, proposed that grievances regarding supervisors doing unit work be excluded from the scope of the grievance procedure.

Kawano responded to the UFW proposal regarding picket line observance and refusal to handle struck goods by adding the following language: "only to the extent that the ALRA creates such a protected right. ..." Neeper, in response to a Beauchamp question, said he did not know whether the ALRA provided such protection.

With respect to "Health arid Safety" (Article 14), Kawano saw an advantage to a safety committee; it proposed that the committee function in an advisory capacity. Neeper also noted that some of the chemicals which the UFW proposed to ban were not prohibited by law.

Neeper stated that the UFW Union label proposal was not applicable to Kawano's operations, but if Kawano ever wanted to use the UFW label, it was prepared to follow the UFW's rules.

Responding to the UFW's "No Discrimination" proposal, Neeper said the article should be made applicable to both the Company and the Union. He explained that he had excluded violations of the article from the scope of the grievance procedure because the state and federal agencies in the field were not bound by an arbitrator's decision, and the discriminatee had a right to go to the agency regardless of any grievance procedure.

Kawano also proposed modifications of the UFW language on the following subjects: "Article 17, Bulletin Boards," "Article 18, Income Tax Withholding," "Article 19, Credit Union Withholding," "Article 20, Locations of Company Operations," "Article 21, Subcontracting," "Article 22, Modification" (favored nation clause), "Article 24, Successor Clause," and "Article 25, Family Housing."

Kawano accepted the UFW proposal on "Article 23, Savings Clause."

In addition to responding to the UFW's proposed provisions, Kawano proposed the following articles: "Management Rights," "No Strike/No Lockout," health insurance and wages.

When Neeper finished going over Kawano's proposal, Beauchamp expressed his dissatisfaction, saying that the Company was only prepared to do what the law required. He said he wanted to review his notes to make sure he understood the Company's position. He also said that he would have to discuss their proposal with the workers.

The parties had previously agreed to meet on October 14; however, Beauchamp was not sure he could have a response ready by that meeting.

Meeting No. 7--October 14: This meeting was cut short by Beauchamp because he had not had sufficient time to prepare a response to Respondent's counterproposal. Beauchamp was disappointed with the Company's position, again saying that Kawano was apparently prepared to do only what the law required. Neeper reviewed his proposal point-by-point, noting the areas in which the Company proposed going beyond what the law required. Neeper also stated the UFW had not responded to the Company's proposals on wages, management rights and a no-strike clause.

Beauchamp said he would give Neeper an economic proposal and a local issue proposal. No mention was made of the need for any additional information from Kawano before such proposals could be presented. The parties agreed to meet on October 27.

On October 18 Neeper mailed Beauchamp the Company's proposed grievance procedure.

Meeting No. 8--October 27, 1977: The Union had prepared no response to the October 12 Kawano proposal. Beauchamp wanted Neeper to review the Kawano proposal again and explain why UFW proposals were not acceptable. Neeper did this. For the most part, his presentation amounted to a reiteration of what he said during his presentation of October 12. There was additional clarification in the following areas: Kawano failed to propose a specific check-off provision because it considered check-off an economic item and part of its economic package. Kawano considered a hiring hall unnecessary, and also it did not want to be limited to one source in procuring its employees; however, it was agreeable to voluntary utilization of the hiring hall.

Kawano was opposed to a permanent arbitrator and was also opposed to using a State Conciliator as the arbitrator because .there was only one person in the San Diego office. Thus, using the Conciliation Office would mean the de facto establishment of a permanent arbitrator under the contract.

Neeper thought seniority was unnecessary; but since the UFW had proposed seniority language, Kawano had responded with a proposal on the subject.

Kawano felt the article on "Suspension and Discharge" was unnecessary, but had responded since the UFW made a proposal covering the subject matter. Beauchamp replied that by limiting the article to "employees with more than 90 days' continuous service, it would apply to very few people.

Turning to access, deeper agreed that the ALRA on its face did not require the Company to permit any post-election access. Therefore, he asserted the Company had no legal obligation to provide such access. Neeper did not respond to Beauchamp's contention

that the UFW had a right to visit workers living on the property independent of any right granted by the ALRA. Neeper stated that whenever the UFW moved off a demand for unlimited access, Respondent was prepared to move.

Kawano saw no need for a provision relating to new or changed jobs since it had a flexible work force and people did not work full-time as other than general farm labor. However, since the Union wanted language dealing with the problem, it was prepared to discuss the subject. Neeper reiterated the substance of the Kawano proposal, explaining that the only issue which could go before an arbitrator was one regarding the rate to be applied to any new classification. Kawano proposed that the rate ultimately arrived at not be retroactive, because permitting retroactivity would tend to delay agreement on a new rate.[11/] Beauchamp said the proposal gave the UFW nothing; Neeper responded that it gave the Union the right to strike if Kawano would not agree to arbitration. Neeper repeated his statement that this was the Employer's initial proposal.

Neeper again stated that Kawano did not want discrimination issues covered by the grievance procedure because the grievant was not bound by it.

At the UFW's request, the meeting terminated when Neeper completed his discussion of the first 20 articles of the Kawano proposal. The UFW wanted time to go over the proposal because it was important for the Union to understand management's position. Beauchamp acknowledged that he got a lot from the discussion.

The parties agreed upon November 4 as the date for the next meeting. There was no mention of the UFW's "Request for Information" or the need for additional information before submitting a new proposal.

Meeting No. 9--November 4, 1977: Neeper completed his review of Kawano's proposal, discussing Articles 21 through 30. When he was finished, Beauchamp said he would use Neeper's remarks to assist in preparing a counterproposal which he hoped to have ready at the next meeting. He told Neeper there are areas where we can agree and areas which will require much more work.

Since Beauchamp was unable to meet earlier, the next meeting was set for November 22. There was no mention of the "Request for Information" or the need for additional information in order to prepare a response.

Meeting No. 10--November 22, 1977: The UFW submitted its response to Kawano's counterproposal of October 12. It presented modified positions on the following articles: 15, "Union Label"; 16, "No Discrimination"; 17, Bulletin Boards"; 18, "Income Tax Withholding"; 19, "Credit Union Withholding"; 20, "Location of Company

---

[11/] Beauchamp apparently did not point out that the absence of retroactivity provides the Employer with a motive for prolonging the new-rate discussions.

Operations"; and 22, "Modification." After Beauchamp outlined the changes made in each of the articles, the Company caucused and returned to present counterproposals.

Its counterproposals on "Union Label," "Bulletin Boards," "Location of Company Operations," and "Modification" were accepted by the UFW and three of the four articles were signed off.[12/] The parties also signed off Article 23, Savings Clause. Modified positions were presented with respect to the remaining articles.

Beauchamp asked whether Neeper would object to his use of a tape recorder at the next bargaining session since he would not have a "note taker" available to him. Neeper said he did not object to using a recorder in the same manner as a note-taker, i.e., stopping periodically and dictating what had transpired. He understood agreement was reached to permit use of a recorder in the manner described.

Beauchamp made no mention of the "Request," nor did he state a need for further information before making additional proposals.

The Union suggested that the meetings be held at the offices of the State Conciliation Service. Respondent raised no objections. Thereafter all meetings were held in the State's offices. The meeting closed at noon without objection from Beauchamp. The parties agreed upon December 8 as the date of their next meeting. Beauchamp regarded the meeting as very productive.

Meeting No. 11--December 8, 1977: During the course of the meeting, Beauchamp read a statement of concern about excluding "No Discrimination" language from the agreement into the tape recorder he was using as a "note-taker." Neeper was disturbed by this practice and suggested the UFW was merely trying to build a record for an unfair labor practice case.

Thereafter, the UFW presented modified positions on "Article 13, Records and Pay Periods"; "Article 16, No Discrimination"; and "Article 18, Income Tax Withholding." The Union had prepared a clean copy of the proposed "Article 15, Union Label," on which agreement had been reached the previous meeting and it was signed off. Neeper submitted modified proposals on Articles 16 and 18, and said he wanted to discuss Article 13 at the next meeting.

There was no discussion of the "Request for Information" or the need for additional information. Nor was any contention made that the Employer had failed to comply with the "Request" or that the failure to do so inhibited the UFW in the bargaining process. The

---

[12/]"Signed off" was the term used by the parties to denote agreement on a particular article, contingent upon reaching a total contract. In practice each party initialed a draft of the signed off article.

meeting lasted approximately an hour and a half to two hours.

The UFW asked to transfer the meetings to Oceanside for the convenience of its committee members and Ray Kawano. Neeper opposed the change. He said there were no adequate meeting facilities at the ranch. He also expressed a preference for meeting on neutral ground.

Meeting No. 12--December 15, 1977: Beauchamp opened the meeting by telling Neeper the UFW had received an unsatisfactory response to its telephone call to the Kawano office requesting keys to all Kawano ranches. Beauchamp asked whether Kawano would provide keys. This was the first occasion of such a request.

The Company then proposed renewing the interim access agreement. Beauchamp would not agree to this, saying that the Union had had bad experience under the agreement. The parties disagreed as to whether the agreement was still operative. Respondent contended it was; the Union argued to the contrary, contending the Company had failed to exercise in timely fashion its option to renew the agreement.

The UFW submitted a modified position on "Recognition," and "Records and Pay Periods." Neeper said Kawano was unwilling to change its existing accounting system to meet the demands of the UFW "Records and Pay Periods" proposal.

Neeper said the UFW had not presented a complete proposal and asked whether such a proposal was forthcoming. Beauchamp said it would be difficult since the Company had not responded to the UFW's "Request for Information." This was the first mention of the "Request" to Neeper. Beauchamp did not want to give Neeper a complete j response, but said he would do so if Kawano were to demand such a response. He said any economic proposal the Union made would be astronomical in order to compensate for the lack of agreement on Union security and other things which the Union needed in the contract.

Beauchamp’s use of the tape recorder was discussed. Neeper contended the UFW was violating the law by recording the bargaining sessions. He said that there was ample National Labor Relations Board precedent supporting his contention. He said the recorder intimidated him; however, he did not say he would refuse to negotiate if Beauchamp continued to use the recorder.

Meeting No. 13--December 22, 1977: Beauchamp presented a three-article package ("Union Security"; "Records and Pay Periods"; and "Management Rights") in an attempt to resolve some of the issues. The language of the package was taken from existing UFW contracts. Neeper said he would prepare a package by way of response. Beauchamp also submitted modified proposals on Article 5, "Grievance and Arbitration"; Article 12, "Worker Security"; and Article 24, "Successor Clause." The "Worker Security" proposal sought to insure that Kawano employees would not be required to cross a UFW-sanctioned picket line or to scab on employees of another company engaged in a; UFW-sanctioned strike. Agreement was reached on Article 18, "Income

Tax Withholding."

Beauchamp turned the discussion to the status of shed employees, contending they were covered by the certification. He demanded the same information regarding them as had been requested for field workers. Neeper's response was that both parties knew that the UFW's petition had not covered shed employees, that shed employees were not included on the list of eligible voters and that the ALRB had not intended to include them.

Neeper was unable to respond to Beauchamp's December 15 questions regarding the "Request" because he had been unable to meet with Kawano or Geerdes. He wanted Beauchamp's requests in writing, stating that the Company had responded to the earlier "Request" and that he did not understand the current "Request." Beauchamp responded that the Company had not made clear what information was available to him or in what form. He further stated that from the UFW's point of view, language and economics were interchangeable and that it was essential for him to have the economic information the UFW requested in order to put together the total response requested by Kawano. Otherwise he would have to prepare an economic package the "likes of which" Neeper had never seen before. Neeper responded that whatever the Union wanted to do should be submitted in writing.

January 6-February 1, 1978: The parties were next scheduled to meet on January 6. The UFW cancelled the meeting. There was an hiatus in negotiations until February 1 when the parties resumed meetings with Geerdes as Kawano's negotiator and Michael Heumann entered negotiations as the UFW spokesman. During this period there was an interchange of correspondence between the parties. Heumann directed a letter to Geerdes dealing with three subjects: re-submission of the "Request for Information" coupled with an assertion that Respondent had provided only a limited amount of information, a demand for clarification of Respondent's position regarding shed employees, and a demand that one of the Kawanos be present at negotiations.

Meeting No. 14--February 1, 1978: Heumann spent a considerable amount of time reviewing the UFW's "Request for Information." The discussion then turned to the status of shed employees. Geerdes explained they had been ineligible to vote in the election because they were not at the time Kawano employees. He said they were presently not properly part of the unit because the shed was a commercial operation. Twenty to 30% of its total output was packed for outside growers.

Heumann voiced his objection to Respondent's practice of paying undocumented workers $2.4-0 per hour while paying documented workers $2.90 per hour plus a travel premium. He said he had been sent to San Diego to eliminate this practice. Geerdes said this problem should be dealt with during the course of negotiations.

Access problems were discussed. Heumann voiced the UFW's need to contact the workers. He also acknowledged that access

should not interfere with work or the security of Respondent's property. Geerdes responded that the Company had agreed to an interim access proposal but now had a bad feeling about access due to harassment of their foremen. He noted that the agreement had provided for Beauchamp to contact the office if the UFW encountered problems with access and that no complaints had ever been lodged with the office. Heumann said the Company was obliged to permit reasonable access so that Union representatives could meet with the workers living on the premises. Heumann argued that the policy behind the Board's access regulation and the Buak case supported his position.[13/] He said Buak gave the UFW a right independent of the ALRA to visit workers where they lived. However, he wanted to establish access rights pursuant to an interim agreement, viewing this approach as a technique for improving the relationship between the parties. Heumann said he would try to prepare and submit an agreement setting forth the UFW's access requirements by February 3.

Heumann wanted a ranch tour. Geerdes was to attempt to arrange it for February 10. Dates were agreed upon for future meetings. There was no discussion of contract proposals. Heumann did not want to discuss proposals until after the access problems were resolved.

February 3, 1978: Heumann delivered to Geerdes a proposed access agreement. It essentially tracked the ALRB's Access Regulation. It also required Kawano to provide keys to locked gates so that uninhibited vehicular access would be possible. The agreement further proposed prior notification of access and a list of the UFW representatives authorized to "take" access.

Meeting No. 15--February 10, 1978: Geerdes stated Kawano's objections to the proposed interim access agreement: Kawano wanted a designated area for UFW meetings with its workers because the Company was concerned about crop and equipment damage. Heumann responded that Kawano's oft-demonstrated animus toward the UFW would cause workers to feel intimidated if they could meet with the Union only in a designated area. He said workers would be reluctant to place themselves in the position of publicly supporting the UFW.

Kawano declined to provide keys. Geerdes said if the office were notified when the UFW wanted to take access, Kawano would send a supervisor to open the gate. He noted that there was only one ranch where a key was necessary. Kawano also objected to a provision stating that speech alone would not be considered as "disruptive conduct" permitting termination of the agreement. Geerdes stated that in 1977 inflammatory speeches during periods of access had produced problems.

Heumann responded to these statements, and also said he wanted the agreement to clearly state it imposed no limitation on the UFW's right to visit workers living in the brush adjacent to the

---

[13/] United Farm Workers of America v. Superior Court (Buak Fruit Co.), 14 C.3d 902 (1975).

fields.

After the lunch break, Heumann stated that because of lack of progress in the negotiations, he had consulted Cesar Chavez, who authorized him to propose an off-the-record meeting between John Kawano and Chavez. Such a meeting was later held with Geerdes and Heumann also present.

Heumann's ranch tour was arranged for February 16.

March 6, 1978, Tour; Heumann's tour occurred on March 6 rather than February 16. The tour party consisted of Raymond Kawano, Geerdes, Heumann and Manuel Acosta, a member of the negotiating committee. The group assembled in the parking lot at the San Luis Rey Ranch and proceeded to the Santa Fe Ranch. They stopped at a locked entrance to the ranch located at the end of a public road. They did not proceed further because heavy rains had made the ranch roads too muddy. Heumann asked what crops were grown and how much acreage was devoted to each crop. He was told Respondent contemplated planting 100 acres of summer tomatoes and 100 acres of fall tomatoes.

The party next visited Ivey. Again, they did not proceed beyond the entrance to the property because of road conditions. Kawano's fields were not visible from the ranch entrance; so Heumann was told how to reach them from the ranch entrance. Kawano said they had planted 50 acres of pole tomatoes the previous year and hoped to plant 150 acres the current year; however, their plans regarding future planting were uncertain because the rains had prevented commencement of land preparation.

The party proceeded to the Bonsall Ranch. Workers were picking strawberries, Heumann was told that there were about 4-0 acres in strawberries and that peak employment in strawberries would approximate 25 workers. Kawano said he could not be sure of the work force because rain damage made uncertain how much of the crop could be harvested. At the back of the strawberry acreage, Heumann saw several small buildings which Kawano acknowledged were on property they had under lease. Heumann thought that some of the workers might be staying in them.

Kawano said they customarily planted cherry tomatoes at Bonsall and probably would plant a crop in 1978.

After leaving Bonsall the group returned to the ranch office at San Luis Rey. Heumann and Geerdes went into the office to get Heumann a copy of Kawano's health and welfare plan. While in the office, Heumann made no request to examine any records.

Meeting No. 16--March 10, 1978: Geerdes presented a written counterproposal on interim access. Heumann responded that Geerdes gutted the UFW proposal by deleting the reference to vehicular access and by failing to provide keys for the UFW. The Union caucused and returned with a modified position which limited the number of persons per access to five and which provided that when taking noon-time access representatives could come onto the property

sufficiently in advance to be able to meet with workers at the outset of the lunch break, thereby being able to have a full half-hour with the workers. No agreement was reached; the discussion moved on to other areas.

Heumann asked whether Kawano was prepared to accept the same language for "Income Tax Withholding," "Family Housing" and "Management Rights" which Takara had accepted a few days earlier. Geerdes said he would check to see.[14/]

The UFW was prepared to submit modified positions on the following articles: "Discipline and Discharge," "Right of Access to Company Property," "New or Changed Jobs," "Maintenance of Standards," "Supervisor and Bargaining Unit Work," "Workers. Security," "Subcontracting" and-"Successor Clause." In return Heumann asked Geerdes to present kawano's "most reasonable position" on the first five UFW articles.[15/] He said the parties were extremely far apart on those articles and the separation was a crucial difficulty. Heumann promised to prepare an economic proposal on everything but wages; a wage proposal could not be submitted until he received the job classification and production information previously requested. The meeting lasted approximately one hour and was then adjourned.

Meeting No. 17--March 16, 1978: Heumann asked whether Geerdes had the information previously requested regarding the volume packed by the Kawano shed for outside growers. Geerdes did not have this information; he agreed to check into the matter.

Heumann asked, as he had on March 10, whether there was agreement: on Articles 18, 25 and 26. After a short caucus Kawano accepted the Union's proposals. Clean copies of each were to be prepared and executed at the next meeting.

After a short discussion of a Takara problem, the parties exchanged proposals. As promised on March 10, the Union submitted proposals on eight articles. An economic proposal was also submitted. On its part, Respondent submitted proposals on Articles 1 through 4.

Heumann suggested that the best way to proceed was to try to reach agreement on non-economic issues first, initially discussing those areas where differences could be resolved more easily and then go on to the harder areas after having built "a track record of being successful at resolving differences in easier areas."

Geerdes responded that language was money and questioned Heumann's assumption that it would be easier to reach agreement on non-economic issues. Geerdes suggested that the parties exchange all the proposals which they had prepared for this meeting. This was done and the parties caucused.

[14/] Geerdes also acted as akara's negotiator.

[15/] Recognition, Union Security, Hiring, Seniority, and Grievance and Arbitration Procedure.

When they returned, Geerdes discussed in detail the portions of particular articles in the UFW proposal which gave Kawano problems.

Regarding "Discipline and Discharge," Kawano did not want warning notices covered by the grievance procedure; grievances involving disciplinary matters should be limited to cases of discharge or suspension. Geerdes expressed concern about giving an employee a right to have a representative present at any interview likely to lead to disciplinary action, stating that such a practice might cost the Employer production time. Kawano also opposed the expedited arbitration procedure proposed by the UFW.

With respect to "New or Changed Jobs," Kawano still wanted to limit the scope of an arbitrator's authority in grievances arising under the article to the question of whether the wage rate which the Employer had established was proper, thus excluding the subject of appropriate job content from the arbitration process. Kawano contended it should have a unilateral right to establish the content of any job.

Geerdes objected to the scope of the UFW "Maintenance of "Standards" proposal and suggested spelling out the items to be covered. Heumann responded that the whole purpose of such a clause was to insure no reduction of conditions of employment which got overlooked during the course of the bargaining and to insure no reduction in conditions of which the Union was unaware at the time of negotiations.

Geerdes said that Kawano was opposed to including the words "and other employees" in the proposal on non-unit employees doing bargaining unit work. Heumann said that because the Company would not agree that the shed workers or the office clericals were unit employees, the language was necessary to prohibit their doing unit work. Heumann proposed a procedure for resolving the question of the clericals status which called for an initial statement from Geerdes of the basis for his "confidential" contention. Thereafter, .if the UFW disagreed with the Company's position, it would discuss the matter with the affected workers. Geerdes had no objection to this procedure. During the discussion of this article, Heumann once more stated his need for the information regarding shed employees.

In discussing the UFW's "Workers Security" proposal, Respondent asked whether workers would be asked not to cross a picket line placed at the packing shed by another union. Heumann said he could not answer the question until the status of shed employees had been determined.

Geerdes said the parties were far apart on "Subcontracting." He said he would have a counterproposal at a later date. He also promised to submit a counterproposal on "Family Housing."

When the discussion turned to the Company's proposals, Heumann noted that Kawano's proposals on Articles 1 through M-were the same as those made by Takara a few days earlier and said the

UFW's response was the same as the response made in the Takara negotiations.

The discussion moved to the interim access agreement and after some discussion of problem areas, the parties agreed on an interim agreement to take effect April 10.

March 16-April 2, 1978: Meetings scheduled for March 23 and March 30 were cancelled by Heumann. On one occasion he was ill, and on the other he had a conflict with a scheduled arbitration.

Meeting No. 18--April 13, 1978: There were initially some questions from Heumann regarding Respondent's failure to have produced shed employee information. Heumann then reiterated his request for the cost of Respondent's health insurance plan.

Respondent presented modified positions on the following subjects: "Article 10, Maintenance of Standards," "Article 11, Supervisors and Bargaining Unit Work," "Article 12, Workers Security," and "Article 24, Successor Clause." After caucusing, Heumann said that agreement could be reached on Article 10; that Article 11 still presented'-problems in that the Union wanted the words "and other employees" included. Heumann said Kawano's proposed picket line language created problems which the Company probably had not anticipated because it created the impression that the Union would permit workers to pass through a picket line with impunity. He said that the parties were getting closer to agreement on "Successor Clause" language by virtue of the Company's most recent proposal.

Heumann said the UFW would reply at a later meeting with proposals on Articles 12 and 24 which might resolve the remaining differences.

Meeting No. 19--April 11, 1978: The first order of business was execution of the interim access agreement. There was discussion about UFW representatives not demeaning supervisors in the presence of the crew, and an assurance from Geerdes that supervisors would not engage in surveillance of UFW meetings with the workers. The Company requested that the UFW's bus not be used to take access because it was too large and heavy for the ranch roads.

At Bonsall, the agreement covered only access to cultivated areas, it did not cover land inside the barbed wire fence surrounding the property, but not under cultivation. Kawano stated that only the cultivated area was Kawano premises, and it declined to grant permission for UFW representatives to cross cultivated land to meet with persons living on the perimeter of the fields.

Geerdes announced that Kawano wished to effect an interim wage increase. It proposed a rate of $2.65 per hour for the first six months of employment and a rate of 32.90 per hour thereafter. The UFW argued that anyone formerly paid $2.90 per hour should not be reduced to the $2.65 rate. Heumann also sought restoration of
//

the ride premium and the "ritero" rate of $3.20 per hour.[16/]

There was discussion of the UFW's request that Kawano rehire one vanload of employees from among the group involved in another unfair labor practice case in which Kawano was the respondent.[17/] The parties agreed to an off-the-record meeting aimed at setting outstanding unfair labor practice issues.

Meeting No. 20--May 3, 1978: Geerdes was on vacation so Neeper again acted as Kawano's spokesman. Since Neeper had been away from the negotiations for a period of time, Heumann suggested that he select the topics for discussion. Neeper agreed.

The parties discussed and reached tentative agreement on language binding a successor in interest to the terms and conditions of the agreement.[18/]

Neeper explained he had no objection to the UFW's proposal on "Credit Union Withholding" but needed an idea of the cost involved and for this reason had put the "no cost increase" language in the proposal. Heumann agreed to check the possible cost impact of the proposal. He "told Neeper .that Kawano employees were not presently eligible to participate in the Credit Union but would become eligible during the term of the agreement.

Neeper was prepared to agree to the UFW proposal on "Records and Pay Periods" if the UFW would agree that Kawano's present practices met the UFW requirements. He explained to Heumann what pay records were maintained and what information was conveyed to the worker and how payroll information was transmitted from the field to the office and the computer print-out sheets. Discussion on the subject was discontinued pending receipt by Heumann of exemplars of the pertinent records.

Neeper said Kawano's problem with the UFW "Workers Security" (picket line recognition) proposal was its impact on the shed. Heumann pointed out that if the shed were part of the bargaining unit, the clause would not be applicable, and Respondent would be free from picket lines at the shed because of the no-strike clause. Neeper said he would try to get the records so that the status of the shed i could be ascertained.

Meeting No. 21--May 11, 1978: Neeper was again Kawano's spokesman. He still did not have the requested shed information. Heumann wanted the question of the shed's commercial or agricultural status resolved. Neeper asked whether a petition for unit clarification would be useful.

[16/]See Kawano. Inc., 4 ALRB No. 104 (1978), pp. 2-4, for discussion of the "ritero" system. The system was discontinued in 1976.

[17/]4 ALRB No. 104.

[18/]Article 24, Successor Clause.

The parties initialed the agreed upon "Article 24-, Successor Clause" and went on to discuss the following subjects: "Article 19, Credit Union Withholding"; "Article 21, Subcontracting"; "Article 16, No Discrimination"; "Article 13, Records and Pay Periods"; "Article 12, Workers Security"; "Article 9, Leave of Absence": "Article 8, New or Changed Jobs"; and "Article 11, Supervisors and Bargaining Unit Work." Neeper agreed to prepare and submit written counterproposals on Articles 8, 9, 12, 13, 16 and 21. Heumann was to submit a counterproposal on Article 11.

June 12, 1978: On or about June 12, Heumann was notified that Kawano had stopped packing for outside growers and that the UFW was now recognized as the bargaining representative for shed employees. Kawano agreed to provide the information requested with respect to shed employees.[19]

Meeting No. 22--June 20. 1978: Heumann again stated that UFW representatives needed keys to gates at Ivey and Santa Fe Ranches in order to visit workers living on those ranches. Geerdes said that Kawano did not lease the uncultivated areas and was concerned about providing the UFW access to areas which it did not lease. Heumann also noted that vending truck operators were provided with keys. He said the UFW would go to the landowner if Kawano would not provide keys. There is no evidence such action was taken.

Heumann proposed an indefinite extension of the interim access agreement. He also proposed extending its coverage to the worker living areas. Geerdes was prepared to extend the agreement to July 31 but would not agree to an indefinite extension.

Respondent's proposed interim wage increase was discussed. The UFW opposed the six-month break-in period and proposed reducing it to 30 days. Kawano responded by agreeing that past service with the Company would be counted in determining whether a current employee had six months' service.

There was discussion of the UFW's proposal for immediate rehire of 53 employees found by an Administrative Law Officer to have been discriminated against.[20/]

No contract proposals were discussed during the course of the meeting.

Meeting No. 23--June 27, 1978: The meeting opened with Heumann giving Geerdes a copy of the UFW-TMY agreement and proposed it be a master agreement between the UFW and Kawano. Heumann was prepared to accept the TMY language where relevant to the Kawano operations and was open to modifying TMY if necessary to fit Kawano's operations. Geerdes asked whether articles already signed-off could be

---

[19]A meeting scheduled for May 23 was cancelled because Heumann had to undergo knee surgery.

[20/]4 ALRB No. 104 (1978).

substituted for the same subject matter in the TMY contract. Heumann reviewed the articles and told Geerdes such a procedure was acceptable.

Geerdes presented Employer proposals on the following subjects: "New or Changed Jobs," "Leave of Absence," "Workers Security," "Credit Union Withholding," and "Subcontracting." Each proposal was discussed, and the Employer changes in position were outlined to Heumann.

Heumann presented the following counterproposals: "Recognition," "Union Security," "Right of Access to Company Property," "Maintenance of Standards," and "No-Strike/No-Lockout."

Heumann said that Articles 1 through 5 were the guts of the non-economic items. He wanted these articles discussed at the next meeting.. Geerdes raised the subject of the proposed interim wage increase; each party reiterated its previously stated position on the issue. Discussion of "Maintenance of Standards" produced some modification in positions. "Credit Union Withholding"[1] was signed off after discussion and modification.

Meeting No. 24--July 6, 1978: The meeting began with Respondent stating that the TMY contract was an unacceptable package. Geerdes said that Kawano wanted to submit a complete package response to the TMY proposal.

Heumann said the UFW could not negotiate down from TMY because Kawano’s workers would challenge the quality of their representation, and because growers with whom the UFW had already reached agreement would feel betrayed if the UFW gave Kawano a competitive advantage. However, the UFW was prepared to look at any package proposed by the Employer.

July 31, 1978: Geerdes mailed Heumann a complete package as a counterproposal to the TMY package. It was conditioned upon no retroactivity and no additional recovery as the result of any decision on' the charges involved in the instant proceeding.

Kawano’s package incorporated all the subject matters on which the parties had previously reached tentative agreement. It contained modifications of prior positions in the following respects: UFW membership on and after 30 days of employment became a condition of employment; there was a modification of its previous seniority position; the UFW position permitting arbitration of verbal . or written warning notices was adopted; its basic position on access was adopted; Kawano broadened its position on "Maintenance of Standards" by adopting the UFW concept regarding the term "other conditions"; Kawano's position regarding work by non-bargaining unit personnel was broadened to include all non-unit people irrespective of whether they were supervisors. The UFW's arbitration procedure was adopted, except for expedited arbitration; Kawano's health and welfare position was modified to propose the Robert F. Kennedy plan and a contribution rate of $16-1/2 per hour on behalf of all eligible employees; however, the Kawano proposal did not guarantee maintenance of benefits, i.e., did not propose paying any increase in premium costs

which might occur during the life of the collective bargaining contract.

Kawano proposed increasing field workers' wages to $3.00 per hour; no increase was proposed for the shed workers. No fringe benefits other than health and welfare were proposed.

Meeting No. 25--August 8, 1978: The July 31 Kawano package provided the basis for discussion. Although the Company proposed a Union security clause, Heumann was disturbed by the 30-day rather than five-day grace period Kawano proposed, and he also objected to the nonmandatory hiring hall proposed by Kawano and to its seniority language. He said the UFW would submit a mini-package covering the first five articles.[21/]

Heumann said Kawano's package brought the parties closer together. Geerdes responded that the package, though not a final proposal, was as close to the TMY proposal as Kawano thought it could get.

Meeting No. 26--September 20, 1978: The parties reached agreement on "Article 16, No Discrimination." The agreement refleeted Kawano's desire that a person alleging discrimination would have to choose between the contractual forum and general law forums for pressing his claim.

The UFW submitted the following economic proposals: "Citizenship Participation Day," "Health Insurance," "Leave of Absence for Funerals," "Rest Periods," "Travel and Out of Town Allowance," "Duration of Agreement," and "Wages." The proposed contribution rate for health insurance was reduced to $.16-1/2 per hour. The proposed pension contribution was reduced to $.15 per hour. Leave for bereavement pay was reduced to three days and its proposal on rest periods was reduced from 25 minutes to 15 minutes.

The Union also presented a group of non-economic proposals. However, Heumann was unable, as promised, to make a package proposal on Articles 1 through 5 because the membership would not permit such a proposal until they found out what the Company was prepared to do on the economics of the agreement.

The parties agreed to a course of action for proceeding with the negotiations: Kawano would respond to the UFW economic proposal; the UFW would submit a mini-package on Articles 2, 3, 4 and 5 to which the Company would respond. Each party stated that its total package was still available for acceptance.

October 3, 1978: Geerdes wrote Heumann, responding to a July 17 letter from Heumann protesting a unilateral wage increase granted packing shed workers. Geerdes' letter stated the in- i crease was made pursuant to an earlier agreement with shed workers to increase their rates when rates in other sheds in the area were

---

[21/] "Recognition," "Union Security," "Hiring," "Seniority," and "Grievance and Arbitration Procedure."

increased. Since other shed rates had increased, Geerdes contended that Kawano would have violated existing conditions governing the compensation of its shed workers had it not granted a similar increase.

October 7, 1978: Heumann sent Geerdes a communication setting forth (1) a modified "Health and Safety" proposal; (2) a response to Geerdes' contentions re the shed worker wage increase, asserting that Kawano had an obligation to bargain with the UFW before effecting the increase; and (3) a response to Geerdes' inquiry regarding whether Heumann was through with the Kawano records in Geerdes' office.

October 9, 1978: Heumann hand-delivered to Geerdes a mini-package covering Articles 2 through 5. The same day Geerdes mailed Heumann a counterproposal dealing with the economic items in the UFW proposal as well as a revised proposal on "Discipline and Discharge," and on "Right of Access to Company Property."

By letter of October 11 Heumann suggested that the parties meet to discuss the series of proposals which had recently been exchanged.

Meeting No. 27—-October 17, 1978: The meeting lasted about a half an hour. There was some discussion of Articles 2 through 5 as they appeared in the UFW's mini-package as well as some discussion of its mini-economic package.[22/] Kawano agreed to prepare a mini-economic package for discussion at -the next meeting. Geerdes said the cost to Kawano of the UFW proposal would be a million and one-half dollars per year.

October 25, 1978: Geerdes submitted an economic mini-package covering proposals on wages, health and welfare, holidays, funeral leave, and rest periods. Heumann responded by suggesting the parties meet on November 3.

Meeting No. 28—-November 3, 1978; The parties recognized they were far apart on seniority. The UFW standard Contract language was unacceptable to Kawano because its use of casuals was greater than that of growers in Southern San Diego County.

The UFW's most recent health and safety proposal was discussed. Geerdes inquired as to whether the proposed record-keeping requirement would be satisfied by the Fricker sales invoices-which had been given the Union.

The following topics were discussed: paid holidays; funeral leave; the circumstances under which overtime would be paid; the period of stand-by time for which an individual should be paid; whether vacations should be calculated as a percentage of gross earnings without mention of a fixed time off or whether establishing a fixed period was more appropriate; and the need to guarantee health

---

[22/] Union Security, Hiring, Seniority and Grievance and Arbitration Handling.

and welfare benefits by providing for an automatic increase in Employer contributions to meet increased premium costs. Heumann told Geerdes that pensions and the Martin Luther King, Jr., Fund were “musts."

Geerdes sought the addresses of the 53 persons whom the UFW wanted re-employed so that Kawano could contact them directly for the purpose of explaining its hiring procedures. The list was never provided.

Conclusions: The complaint alleges that Respondent engaged in surface bargaining as manifested by making proposals which could not be accepted by the UFW, by refusing to make meaningful concessions for more than a year following the UFW's certification, and by attempting to undermine support for the UFW by refusing to bargain on certain issues and by engaging in unlawful conduct unconnected with the bargaining process.

The National Labor Relations Board in Borg-Warner Controls, 198 NLRB 726 (1972), appropriately describes the complexity and difficulty of ascertaining whether Respondent has engaged in surface bargaining:

> At the outset we note that no case involving an allegation of surface bargaining presents an easy issue to decide. We fully recognize that such cases present problems of great complexity and ordinarily, as is the present case, are not solvable by pointing to one or two instances during bargaining as proving an allegation that one of the parties was not bargaining in good faith. In fact, no two cases are alike and none can be determinative precedent for another, as good faith "can have meaning only in its application to the particular facts of a particular case." N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 4-10. It is the total picture shown by the factual evidence that either supports the complaint or falls short of the quantum of affirmative proof required by law.

The statutory backdrop for consideration of the surface bargaining allegation is found in Sections 1155.2(a) and 1153(e). Section 1155.2(a) defines bargaining in good faith in the following terms:

> (T)o bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours , and other terms and

> conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The cited language is identical to that found in Section 8 (d) of the National Labor Relations Act: thus, decisions of the National Labor Relations Board as well as recent decisions of the Agricultural Labor Relations Board are appropriately considered in deciding the present case.[23/]

The rule is well established that resolution of surface bargaining issues, i.e., failure to bargain in good faith, rests upon the totality of the party's conduct.[24/] In terms of the present complaint, the task is one of examining the circumstances occurring at the bargaining table as well as away from it to ascertain whether Respondent failed to bargain in good faith. Necessarily, the determination must rest upon inferences drawn from circumstantial evidence; it involves reaching conclusions regarding whether particular actions of Respondent were motivated by a desire to frustrate negotiations or rather by a desire to strike the best bargain possible.[25/] One conclusion results in the finding of a violation, the other that Respondent merely engaged in permissible "hard bargaining." Some actions of Respondent, standing alone, may be equivocal, but when viewed in the context of other events are more clearly seen on one side or the other of the licit-illicit line.[26/] Some actions standing alone might clearly manifest an absence of good faith, but when taken in the total context of the parties relationship do not support such an inference.[27/] In assessing Respondent's conduct, the UFW's conduct during the course of the bargaining is properly considered. The Union's conduct and posture during the course of negotiations may help one evaluate Respondent's motivation and may help explain some of its actions, e.g., why negotiations did not move at a faster pace or why certain proposals were not discussed. The Board noted in Montebello Rose that a union's bad faith bargaining may be a defense to an 1153 (e) charge.

[23/]Labor Code Section 1148.

[24/]National Labor Relations Bd. v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1963); Pay 'N Save Corp., 210 NLRB 311 (1974); Valley Oil Co., 210 NLRB 370, 384 (1974); Montebello Rose Co., Inc., et al. 5 ALRB No. 64 (1979); O. P. Murphy Produce Co., Inc., et al, 5 ALRB No. 63 (1979).

[25/]Columbia Tribune Publishing Co., 201 NLRB 538, 551 (1973).

[26/]Montebello Rose Co., Inc., supra.

[27/]See: Deblin Manufacturing Corporation, 208 NLRB 392, 399 (1974); see also Webster Outdoor Advertising Company, 170 NLRB 1395, 1396-97 (1968); Memorial Consultants. Inc., 153 NLRB 1, 15 (1965).

While the UFW conduct herein cannot be said to reach the level of bad faith bargaining, in the present case, Montebello Rose warrants the propriety of casting the UFW conduct into the mix from which a conclusion regarding Respondent's good or bad faith emerges.

Before turning to an examination of Respondent's bargaining table conduct, certain preliminary observations are appropriate. It is apparent from the record that the. UFW set the tone and tempo of the negotiations. The subjects which were discussed during 28 bargaining sessions between the parties were the subject matters which the UFW wished discussed. There was never an attempt by Respondent to direct discussion away from any topic irrespective of whether it related to contract proposals or to other matters.

It is also apparent from a reading of the record that there were many occasions when contract proposals were not what the UFW wished to discuss. Thus, it was not until the third bargaining session that the UFW commenced discussion of its initial proposal, and it was some four months after submission before it responded to Respondent's initial counterproposal. These facts must be remembered when considering whether Respondent manifested a failure to bargain in good faith by failing to make "meaningful" concessions for more than a year, as alleged in the complaint.[28/]

It is also worth noting, as a preliminary matter, that Michael Heumann, one of the chief UFW negotiators, conceded that Respondent during the course of negotiations did not engage in frivolous questioning at the bargaining table and did not refuse to meet at convenient times and places.[29/]

Respondent's Initial Proposal: When discussion of the UFW proposals began on August 23, 1977, Respondent asserted that it would have problems agreeing to any particular item in the proposal without knowing the UFW economic package. The UFW had not submitted a cost package although its negotiator had one in his possession from the outset of negotiations.

Kawano submitted its initial counterproposal, in response to a request from the Union, at the third meeting following the first discussion of the UFW's proposal and after the UFW negotiator had completed his explanation of the proposal's first five articles.[30/] Predictably, the counterproposal rejected, as presented, all but one of the items contained in the UFW proposal. However, it responded to each of the subject matters raised by the Union. Unquestionably the initial Kawano position contained proposals which it could not

---

[28/]Wald Mfg. Co. v. N.L.R.B., 426 F.2d 1328 (6th Cir. 1970); McCulloch Corp, 132 NLRB 201 (1961).

[29/]This testimony accords with a fair reading of the record. The General Counsel's assertion to the contrary is rejected.

[30/]The UFW proposal was first discussed at the August 23 meeting. The parties met on September 28, October 5 and October 12. Respondent's counterproposal was presented on October 12.

reasonably expect the UFW to adopt. But as one court has noted: "In the realities of the bargaining process, neither party expects its first proposal to be accepted.[31] The Kawano negotiator voiced his awareness of the bargaining process when he presented the proposal by noting that it was a first proposal and that he expected to be negotiated up from his position. Viewed from the vantage point of 20-20 hindsight, this is precisely what occurred. During the course of negotiations, Kawano moved from its initial positions and reached agreement on many contractual provisions. With respect to other contract provisions such as Union security, it moved from its initial position to a position substantially in agreement with the UFW's position.

Even in an environment in which Respondent refused to bargain with respect to certain subject matters, no inference of an intent not to reach agreement on a contract is warranted from an examination of the initial proposals submitted by Respondent. It was not a counterproposal "calculated to disrupt the bargaining process" and did not evidence bad faith.[32]

Refusal To Make Concessions: The General Counsel asserts that Kawano refused to make meaningful concessions for more than a year following certification, thereby evidencing bad faith. In assessing the merit of this contention, it will help to get the time sequence into focus.

The UFW did not commence discussion of its contract proposals until more than five months after certification. Its failure to do so is not chargeable to Respondent.[33] Respondent submitted a complete counterproposal approximately six weeks later.[34]

Three meetings later, on November 22, the UFW submitted a partial response to Kawano's counterproposal. After some discussion and a Kawano counterproposal on the articles to which the UFW

---

[31] N.L.R.B. v. Fitzgerald Mills Corp., 313 F.2d 260, 265 (2nd Cir. 1962), cert., denied. 375 U.S. 834; see also WCUE Radio, Inc., 209 NLRB 181 (1974).

[32] Cf. Montebello Rose Co., Inc., supra.

[33] There was a time lapse of approximately three and one-half months between- certification and the initial meeting between the parties. A sizeable part of this interval is chargeable to the UFW. Its initial contact with Kawano was approximately three weeks after certification, another two weeks following Respondent's response to its demand for meetings is chargeable to the UFW, as is an additional two-week period during which the UFW negotiator made no attempt to contact Respondent's lawyer for a meeting. Respondent had an ". . . affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring." Quality Motels of Colorado. Inc., 189 NLRB 332, 337 (1971). It met this obligation.

[34] October 12, 1977.

had responded. The UFW accepted the modified Kawano proposals on the following subject matters: "Bulletin Boards," "Location of Company Operations," and "Modification." Kawano also presented modified positions on the other articles to which the UFW had responded.

At the next meeting the UFW submitted modifications of three proposals: "No Discrimination," "Records and Fay Periods," and "Income Tax Withholding."[35/] Kawano made a counterproposal with respect to two of the articles and stated it would respond regarding the third at the next meeting.

At the next meeting on December 15, Kawano's negotiator noted that the UFW had not yet given a complete response to Kawano's counterproposal of October 12. At the December 22 meeting, the UFW submitted modified proposals on six additional subjects. Agreement was reached on "Income Tax Withholding," a proposal submitted by the UFW at the December 8 meeting.

It is apparent that the UFW chose the subject matters which it wished to discuss during the period following the submission of Kawano's counterproposal. It is also apparent that Respondent made concessions with respect to some of the chosen subject matters and that agreement was reached with respect to some. Although some of the areas discussed are not customarily regarded as significant as Union security, seniority, wages or fringe benefits, Respondent cannot be faulted for following the UFW's lead and discussing those topics which the UFW wished to discuss. Respondent is not required to negotiate with itself. It need not make concessions with respect to a specific contract provision absent some new or reiterated position from the Union regarding that provision. With respect to the time period between October 12 and January 1, 1978, Respondent did not fail to make concessions with regard to subject matters raised by the UFW.[36/]

The parties did not meet during January, 1978, because the UFW had no negotiator available; thus, another month passed during which nothing was done to effect a collective bargaining agreement and again the lack of progress is attributable to the UFW.

Although the parties resumed meeting on February 1, it was not until the meeting of March 10 that the UFW again resumed discussion of contract proposals. From that meeting until the meeting of November 3, 1978, the parties generally engaged in an exchange of views at each meeting with respect to various contract proposals put forth by both parties. This interaction resulted in tentative agreement on additional subject matters and narrowing the differences with respect to others.

To summarize: the General Counsel's assertion that Respondent failed to make any meaningful concessions for a period of

---

[35/] December 8, 1977.

[36/] Cf. The Western and Southern Life Ins. Co., 188 NLRB 509 (1971).

one year following certification is without merit. It hides the fact that for eight months of that year the status of the negotiations was such that no counterproposals or concessions by Respondent were the order of the day; it overlooks the fact that the UFW selected the subject matters it wished to discuss at the bargaining table; it overlooks the fact that the UFW selected what may be characterized as minor subject matters for discussion; and it overlooks the fact that Respondent and the Union reached agreement on many of these minor matters as the result of mutual adjustment. Respondent's posture vis-a-vis contract proposals and modification of such proposals during the period between the commencement of negotiations and mid-March, 1978, does not manifest an intransigence or obstructionism indicating a desire to thwart consummation of a collective bargaining contract.

Attempts To Undermine Support For The UFW: The General Counsel alleges that certain actions of Respondent separately alleged to be refusals to bargain also evidence a failure to bargain in good faith. As noted below in discussing the allegations of Paragraph 10(b), Respondent failed to bargain in good faith when it failed to tell the UFW the cost of its health insurance program. In retrospect, it is apparent that Respondent's position on this issue must have been fixed prior to the commencement of negotiations. It never intended to supply the information. Thus, for remedy purposes, I find that Respondent failed to bargain in good faith at all times since the initial bargaining session on June 29, 1977.[37/]

Respondent failed to bargain in good faith by failing to inform the UFW of the piece rate paid to certain field workers although the information had been requested and could have been conveyed to the Union without any apparent effort on kawano's part. The record contains no acceptable explanation for not furnishing this information. It is not sufficient that records were provided from which, after some calculation, the rate could have been ascertained. The failure to state the rate warrants the inference that Respondent was harassing the UFW with a bargaining technique designed to interfere with the UFW's ability to make a sensible proposal regarding piece rates.[38/]

Similarly, Kawano's unexplained delay in furnishing the UFW with information it requested regarding Kawano's use of pesticides is circumstantial evidence of a desire to frustrate negotiations and supports the conclusion that Respondent failed to bargain in good faith.

Respondent refused to bargain regarding its office clerical employees on the theory they were confidential employees. This defense has been found wanting.[39/] Respondent's refusal to bargain re its clericals is circumstantial evidence of Respondent's

---

[37/] O. P. Murphy & Sons, supra, at pp. 26-27.

[38/] As noted below, the information was presumptively relevant.

[39/] See discussion of Paragraph 10 (h).

failure to bargain in good faith. As with its failure to produce information regarding the cost of its health insurance, hindsight makes it clear that Kawano's failure in this regard existed at all times since the initial meeting between the negotiations on June 29, 1977.

Additional evidence of bad faith is the refusal of the Respondent to supply the UFW with information from which it could have ascertained whether Respondent's packing shed employees were agricultural employees. In making this inference as in making those set forth above, the sophistication and expertise of Respondent's negotiators cannot be overlooked. The record establishes the "expert" status of both Neeper and Geerdes in the field of labor law.

Respondent granted some of its shed employees a unilateral wage increase, an action found below to violate Section 1153 (e). For the reasons cited above, this conduct also manifests bad faith bargaining.

To summarize: Respondent violated Sections 1153(e), (a) and 1155.2(a) of the Act by failing to bargain in good faith. This conclusion rests upon inferences drawn from the following facts: the failure to furnish the UFW with the premium cost of its health insurance program; the failure to state the piece rate it paid certain field workers; the substantial delay in providing the UFW with requested pesticide information; the failure to furnish information presumptively relevant with respect to its office clerical employees; and the failure to supply the UFW with information from which it could have determined that prior to June, 1978, shed employees were not agricultural employees.

For the reasons cited above, I find that the General Counsel has failed to prove the following allegations of Paragraph 10 (a): that Respondent engaged in surface bargaining by making proposals which could not be accepted and by refusing to make meaningful concessions for a period of more than a year following the UFW's certification. The portions of Paragraph 10(a) relating to said allegations are dismissed.[40/]

2. Failure And Refusal To Supply Relevant Information:

Paragraph 10 (b) of the complaint charges Respondent with refusing to provide relevant bargaining information requested by the UFW, and Paragraph 10 (c) alleges delay in providing relevant

[40/] The discussion of surface bargaining has been restricted to specific allegations in the complaint. The long and sometimes difficult to follow brief of the General Counsel sets forth many other arguments regarding surface bargaining. No purpose would be served by detailing an examination of these facts in terms of assessing whether an inference of surface bargaining was warranted. The need might be otherwise were it not found that Respondent's failure to bargain commenced with the date of the first bargaining session and had not ceased at the time of hearing. See: McCulloch Corporation, 132 NLRB 201, 215 (1961).

information requested by the UFW. Respondent's conduct is alleged to violate Section 1155.2 (a), and Sections 1153 (e) and (a) of the Act.

With respect to the allegations of Paragraphs 10 (b) and (c) I make the following:

Findings Of Fact: The UFW's standard "Request for Information" was sent to Respondent on April 7, 1977, in conjunction with its initial non-economic proposal. The cover letter stated that it was important for the Union to receive the requested information within 10 days. By letter dated May 3, 1977, Respondent replied that it did not see the relevancy of some of the information requested and proposed that these questions be discussed at the initial bargaining session. With respect to other information, Respondent said it would make records available for inspection and/or copying.

Thereafter there was an interchange of correspondence between Beauchamp and Geerdes, and on June 23, Beauchamp wrote Geerdes:

> We are only requesting that the data that is available in the company's records be supplied in the form or manner it is presently available to the company. We are not requesting that the company go through voluminous records and compile the data in a particular form.

Beauchamp also said the Employer was obliged to furnish the material without cost; but if it refused to do so, he wanted a detailed statement regarding the cost of copying the data.

On June 29, 1977, the parties met for the first time. The meeting was devoted primarily to Geerdes response to the "Request for Information." There was no discussion of any contract proposals.

The UFW stated that the information it requested was essential and meaningful to successful negotiations. Beauchamp asserted the Company was obligated to provide the information at no cost to the Union. Geerdes disagreed, saying he had seen no cases placing such a requirement upon an employer. He said Kawano was prepared to provide the information requested, but it was not prepared to pay any cost of reproducing it nor was it prepared to make any compilations of data from the raw records.

Geerdes said the basic payroll records filled one or two large boxes and would be available in his office the week of July 11. He told Beauchamp that those records would yield the following information: name, social security number where available, and current wage rate of each employee. While no classifications are listed on the print-out, Geerdes said the names of those employees who were other than general farm labor could be determined from the wage differential shown on the sheets. Geerdes stated that Kawano has no

separate record of the date of hire of each worker: he said this information could be obtained by reviewing the payroll print-outs. He also said there were insurance registration cards for some employees which would show the employee's birth date and date of hire. These would be made available.

Geerdes stated that Kawano had no records indicating an employee's sex and no records on employee spouses except to the extent that such information might appear on the insurance enrollment cards. The only record of addresses which the Company had was on 3 x 5 cards. However, there was not a card for every employee, and Geerdes could not represent that the addresses shown were the current addresses of the individuals. The 3x5 card would also reflect the individual's date of hire.

Geerdes told Beauchamp that most employees were classified as general field workers and that a small percentage worked driving tractors or trucks. Wage-differentials found in the print-outs would show which employees were other than general field workers; but the print-outs did not list employee classifications. Respondent did not offer to prepare a list of those employees classified as other than general field labor.

The "Request" sought detailed information regarding a broad spectrum of fringe benefits. With the exception of a medical insurance plan, the Company provided none of the fringe benefits enumerated and Geerdes so advised Beauchamp. Geerdes agreed to provide a copy of the medical insurance plan and the claims experience under the plan for the two preceding years; however, he refused to provide information regarding the cost of the plan unless and until he concluded it became relevant to the negotiations. He acknowledged that the plan's cost might become relevant at some future time, but contended it was not now relevant.

Geerdes was unwilling to provide information about wages and fringe benefits of non-bargaining unit employees until it became relevant. As an example of when the information might be relevant, Geerdes cited a bargaining posture in which Kawano stated it could not grant a benefit to unit employees because of its impact on non-unit employees.

Responding to the UFW request regarding other collective bargaining contracts to which Respondent was a party, Geerdes told Beauchamp there were none.

Under the caption "Production Data" the Union sought detailed information concerning crops grown, acres farmed per crop, units produced per crop, utilization of piece rates and the manner in which such rates were calculated. Geerdes told the Union the number of ranches to be planted, the crops to be planted, and the approximate acreage of each ranch. He said cherry tomatoes was the only crop for which a piece rate was paid. He promised to provide information from which the piece rate could be determined.

The Union requested a list of the pesticides used

and details regarding the timing and method of application of each. Geerdes agreed to make available whatever information the Company possessed. He also agreed to provide, as requested, a list of the equipment used in the farm operations.

Beauchamp was unhappy with Geerdes' response. He contended the requested material was essential before the UFW could make a reasonable economic proposal and threatened court action if Geerdes would not produce what the Union wanted. Geerdes asked whether Beauchamp had any legal authority to support his position regarding disputed items. He said that if authority were forthcoming and established the UFW's right to the disputed items, the information would be forthcoming.

The Union wanted copies of the records, not merely the opportunity to examine them. Beauchamp wanted to send copies to the UFW's economist located at La Paz so that a comprehensible summary of the material could be prepared for his use. He acknowledged that he was not going to spend time reviewing the records and said he was not sure he would comprehend them. Geerdes said the records would be available but Kawano would not pay the cost of making copies.

At the second bargaining session on July 15 Geerdes told Beauchamp that the records discussed at the initial meeting were now available for examination.

On July 18 Geerdes sent Beauchamp a copy of the Company's health and welfare booklet, together with copies of the registration cards of covered employees and Xerox copies of the claims paid under the plan. The cards contained the name, address, date of birth and date of hire of the covered employees.

A Xerox copy of the computer print-out for a recent payroll period was also forwarded as an exemplar. The data contained on the printout enables one to learn the worker's crew, his status as a casual or regular employee and whether he was paid by piece rate and, if so, the rate.

On July 18, 1977, the following records were available for the Union's examination at Geerdes' office: daily crew sheets for regular and casual workers for 1974, 1975, 1976 and the first six months of 1977; 1977 field packout records by flats and lugs for strawberries; daily shed packout records for 1977 showing the amount of pack for two outside growers as well as Kawano; payroll journals for 1973 to June, 1977, covering all regular field workers, clerical employees, shed workers, supervisors, sales and management personnel; quarterly returns filed with the IBS for regular and casual employees for the years 1968-1976. [41/]

[41/] The record for 1975 into June, 1977, overed casual as well as regular field help. These findings are based upon the stipulation of counsel.

From the daily crew sheets one can obtain the following information regarding casuals: name, amount paid per day, date worked, foreman for whom worked and the gross payroll for the crew. For a regular employee the following information is available: the crop on which worked and the job performed, e.g., picking, harvesting, dusting or irrigating.

By October, 1977, the following additional records were available in Geerdes office: the 1975 and 1976 W-2 forms for all Kawano employees; four file drawers of the 3 x 5 cards containing the employee's name and date of hire; individual employee compensation cards for 1975, 1976 and 1977; and the quarterly IRS report for the first quarter of 1977.

These records were never reviewed by Beauchamp. Nor did he ask any questions of Geerdes regarding the payroll journal (computer print-out) forwarded to him on July 18.

On August 2 Beauchamp and other UFW representatives were given a tour of Respondent's ranches. At San Luis Rey Beauchamp was provided with the following information about the ranch: its acreage, the crops grown, and the foreman's name. The current operation and 'differences between kawano's methods and those used by tomato growers in Southern San Diego County were subjects of discussion. The group stopped at the site suggested by Kawano for UFW meetings with the workers.

At Bonsall, Kawano pointed out the ranch boundaries. He said about M-0 acres were to be planted in strawberries and four acres in cherry tomatoes. He also told Beauchamp the approximate number of workers normally working at Bonsall.

At Ivey Ranch Beauchamp learned: Kawano leases 40-50 acres of a 400-acre piece of property; access to Kawano's acreage is obtained through the lessor's property which has a locked entry gate; an unlocked gate separates the leased property from the balance of the ranch.

At Rancho Santa Fe, the group entered the property through a closed gate. (It is unclear whether the gate was locked.) They proceeded to an area where a small shed and some chemical storage tanks were located. There were also some trucks located at the site. Beauchamp learned that horses were used in farming this property because the terrain was too rough for tractors. Beauchamp was told the name of the ranch supervisor, the acreage and approximate number of workers who worked at the ranch. Kawano said he was concerned about dust on the plants and, therefore, kept the gate closed to prevent people from driving onto the property. Again, the situs for meeting with employees was indicated.[42/]

During the tour Beauchamp admittedly asked no

[42/] The findings as. to each of the ranches rest upon the testimony of Beauchamp and Raymond Kawano.

questions regarding piece rates, equipment, pesticides, or worker classifications. He testified that he did not regard the tour as a negotiation meeting but merely for purposes of indoctrination: moreover, he thought the information was to be forthcoming from Geerdes.

At the meeting of December 15, 1977, the matter of the "Request" was again raised when Beauchamp said it would be difficult for him to make a complete proposal since the Company had not responded to the "Request." As noted above, Neeper replaced Geerdes as Kawano's negotiator on October 5. The meeting of December 15 was the first mention to him of the "Request," a document which he professes not to have seen.[43/]

Beauchamp asked what information was available and in what form. Neeper had not seen the "Request" before. He asked whether Beauchamp had received any response; Beauchamp said he had received a partial response and that he understood that Geerdes was preparing summaries for him. He said he had received a print-out for one pay period, some insurance forms and the acreage on some crops. He stated this information was not enough to enable him to make an economic proposal.

At the bargaining session of December 22 Neeper was unable to respond to Beauchamp's question of December 15 regarding the "Request" because he had been unable to meet with either Geerdes or Kawano. He said the Company had responded to the earlier "Request," and he did not understand the current "Request."

Beauchamp said the Company had not made clear what information was available to him or in what form.[44/] He said that language and economics were interchangeable and that it was essential for him to have the requested economic information in order to prepare the total response requested by Kawano; otherwise he would have to propose an economic package the "likes of which" Neeper had never seen before. Neeper responded that any UFW response should be submitted in writing.

[43/]It is difficult to credit this testimony. Certainly one would expect Neeper to have reviewed the file and that the "Request" would be there. Alternatively, if he failed to review the file, a question is raised regarding Kawano's lack of good faith. Respondent is expected to have a knowledgeable negotiator available at all times. Crediting Neeper's testimony that he had not seen the "Request" before the December 15 meeting, the eighth meeting in which he participated, the inescapable inference is that he did not devote the attention to the bargaining process which a reasonable business man devotes to the conduct of important matters. His conduct is attributable to Kawano and is circumstantial evidence of Respondent's failure to bargain in good faith. See: 0. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979): Coronet Casuals, Inc., 207 NLRB 304 (1973).

[44/]This assertion is contradicted by credited testimony of Geerdes as well as by earlier testimony of Beauchamp.

In late January, during an hiatus in negotiations, Heumann sent Geerdes a letter suggesting a resumption of negotiations. He enclosed a copy of the "Request" containing "penned clarifications." The clarifications expanded the scope of information the Union wanted by including information regarding all agricultural employees of Kawano for the years 1975 through 1978. irrespective of whether they were currently employed by Kawano. Also requested for the first time were maps of all properties farmed by Respondent during 1977 and 1978. Heumann's letter asserted that only a limited amount of information had thus far been provided; he asked that Kawano bring all information then available to the meeting and to provide the UFW with a schedule of when the balance of the information would be produced.

At the meeting of February 1, 1978, Heumann acknowledged that Respondent had made some records available; however, he needed copies. There was an interchange regarding kawano's obligation to provide free copies of desired records. Without agreeing that Respondent was not required to provide copies, Heumann said he would review the records to ascertain what he needed to copy. Geerdes explained the individual employee information which could be obtained from the payroll records and the insurance cards. He stated that work in strawberries and cherry tomatoes was piece-rate work.

Heumann acknowledged receipt of health plan information regarding benefits, claims experience and the names of covered employees. He restated the UFW's request for the cost of the plan. Geerdes reiterated the position that the plan's cost was not relevant. Heumann said the cost information was essential to permit the Union to make a cost benefit comparison of the Union and Company plans.

Heumann asked what other fringe benefits Kawano provided. Geerdes responded that Kawano provided none of the other fringe benefits ;mentioned in the "Request" even for its clerical and shed employees, Geerdes, as he had with Beauchamp some months earlier, stated that the Company had no obligation to produce information regarding wages and working conditions of non-unit employees, contending that such information was not relevant. As before, he said the information would be forthcoming if it became relevant.

Heumann said that the production data which had been provided was too general; he wanted records which gave specific data with which to work. Geerdes agreed to produce copies of exhibits used by Kawano in defending an unfair labor practice charge which showed the shed packout for 1975. He said the data would-be updated to show the packout for 1976 and 1977. Geerdes told Heumann, as he had told Beauchamp months earlier, the ranch acreages, crops grown and growing cycle of each crop.

He agreed to provide pesticide information showing those used during the preceding two years, and to provide a list of the major equipment used by Kawano. He said Respondent had no maps or its properties. only some old aerial photos.

At the meeting of February 15, Geerdes gave Heumann copies of exhibits which contained a summary of production

data and employee turnover data. Heumann wanted to review the basic records from which the summaries were prepared. Geerdes agreed to make them available. There is no evidence Heumann ever reviewed the records.

During the period between February 10 and 24 Geerdes and Heumann communicated regarding inspection of the Kawano records. On February 24- Heumann made the first UFW inspection of the Kawano records which had been available in Geerdes' office since July, 1977.

At the meeting of March 10, Heumann told Geerdes that he would submit an economic proposal on all items but wages, he said that a wage proposal could not be submitted until he received the information requested on job classifications and production data.

At the meeting of April 3, Heumann again asked when the shed information would be forthcoming. Geerdes said he had requested the information from the Company and did not understand why he had not received it.

Heumann asked Kawano to reconsider its position about disclosing the cost of the medical insurance plan. He said the UFW needed the information in order to decide whether to propose the Company plan or its own. Geerdes was still of the position that the cost of the plan did not have to be revealed.

At the meeting of May 3, 1978, Kawano agreed to provide the UFW with a copy of all payroll records for 1978. The copy was forthcoming later the same week.

At the bargaining session of June 27 there was discussion of Heumann's letter of June 26 regarding the UFW's "Request for Information." Heumann contended the UFW had received none of the information requested. Geerdes said that the quarterly IRS records from 1972 forward were in his office. Heumann said he wanted them from 1968 and contended that the "Request" had so demanded.

The question of whether Kawano was obliged to disclose the cost of its health insurance was again discussed. Geerdes reasserted the position that the Company had no such obligation.

Regarding the UFW request for pesticide information, Geerdes said Kawano had no records showing the pesticides used. The Company had used a sprayer contractor, and it would be necessary to get the pesticide information from him. In September, 1978, Respondent provided copies of invoices showing the pesticides used by the contract sprayer since 1976. No explanation was offered regarding why such invoices could not have been produced at an earlier date.

The status of the office clericals was discussed. Geerdes promised to set forth in writing the basis for the Company's conclusion that the clericals were confidential employees. None was ever sent.

Heumann told Geerdes that he had become aware of

some records which Geerdes did not have in his office. Heumann suggested a joint visit to Kawano's office to sit down and go through all the Company records within the scope of the "Request." Geerdes agreed and the visit took place on July 13.

When the parties visited the Kawano office, Heumann was told he could look at anything which he wanted to see. He asked whether there were any records which he had not already inspected which would provide any of the requested information.

He examined the 3x5 employee cards. He also saw and was given an example of an employee record setting forth the employee's income week-by-week for a calendar year. This type of record was not among the records inspected at Geerdes' office. Heumann requested and was given information regarding wages paid to sorters and packers. He was also provided with sample copies of certain of the records he examined.

Geerdes and Heumann viewed the shed operation through office windows on the second floor. They toured the cooling rooms and the box-making area. Geerdes described the loading operations. He rejected Heumann's request to go into the shed to observe the operation, saying, that it would disturb the workers.[45/] Geerdes described the operation for Heumann and told him about shed employee classifications and their rates.

Geerdes testified that Heumann did not specifically ask about pesticide records or equipment inventories, nor did Heumann ask to photocopy any records which he examined. He did not ask to see the packout records. These records show the volume the shed packed for outside growers and for Kawano.

On July 28, 1978, Geerdes sent Heumann a list containing the names and addresses of each packing shed worker.

On September 13, 1978, Geerdes notified Heumann that quarterly wage reports from 1968 to 1972 were available in his office.

Conclusions Of Law: An employer violates the Act when it fails or refuses to furnish the certified bargaining representative of its employees with information requested by the union which is relevant to the performance of its duty to negotiate a collective bargaining agreement covering the wages, hours and conditions of employment of the workers it represents.[46/] This has long been the rule under the National Labor Relations Act (NLRA). Since Sections 1155(e)

[45/] Geerdes denied that Heumann was prevented from talking to shed workers. Resolution of this conflict is not required, since it would not affect the conclusions reached herein.

[46/] N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967); United Aircraft Corp. v. N.L.R.B., 434 F.2d 1198 (1970); Adams Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978); Autoprod. Inc., 223 NLRB No. 101 (1976).

and 1155.2(a) are substantially identical .to NLRA Sections 8 (a) (5) and 8 (d), decisions under the federal statute are appropriate precedents in dealing with “failure to furnish" issues in the present case.[47/]

Satisfaction of Respondent's obligation requires not only that the information be furnished but that it be supplied with reasonable promptness.[48/] As will be seen below, the evidence establishes that Respondent failed, in certain respects, to meet both obligations. Moreover, an employer may not defend its failure to supply relevant information on the ground that the information is otherwise available.[49/]

When requesting information regarding wages and related conditions, including fringe benefits of unit employees, the Union need not show the precise or actual relevancy of the information. Such information is patently necessary for effectuation of its duty as bargaining representative. Both the National Labor Relations Board and the courts have regarded such information as presumptively relevant.[50/] An employer who refuses to furnish information regarding the wages and related conditions of unit employees risks being found to have violated the statute as of the moment of refusal if it stands silent and fails to communicate an explanation found sufficient to rebut the presumption of relevance.[51/] When the union requests information regarding the wages and related conditions of non-unit employees, the employer's obligation to furnish the information does not arise until the union establishes the actual relevancy of the information it seeks.[52/]

While the Union is entitled to relevant information, Respondent is not required to furnish the information in the exact form in which it was requested. "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining. "[53/] "Good-faith bargaining

---

[47/]abor Code Section 1148.

[48/]B. F. Diamond Construction Company, 163 NLRB 161, 175.

[49/]Autoprod. Inc., supra.

[50/]N.L.R.B. v. Fitzgerald Mills Corporation, 313 F.2d 260 (2nd Cir. 1963); N.L.R.B. v. Rockwell-Standard Corp.. Trans. & Axle Div., 440 F.2d 953 (6th Cir. 1969).

[51/]See Emervville Research Center, Shell Dev. Co. v. N.L.R.B., 441 F.2d 880, 887 (9th Cir. 1971); Curtis-Wright Corp., etc. v. N.L.R.B., 347 F.2d 61 (3rd Cir. 1965).

[52/]San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863 (9th Cir. 1977); N.L.R.B. v. Rockwell-Standard Corp. Trans. & Axle Div., 440 F.2d 953, 957 6th Cir. 1969).

[53/]The Cincinnati Steel Castings Company, 86 NLRB 592, 593.

requires only that (relevant) information be made available at a reasonable time and in a reasonable place with an opportunity for the Union to make a copy of such information if it so desires."[54] The UFW, in submitting its "Request for Information" states the information need only be supplied in the form in which it was customarily available to Respondent. Respondent met this obligation by making payroll and other records available to the UFW as of the middle of July, 1977.

From the outset of negotiations the Union demanded that Respondent pay the cost of reproducing any of its records of which the Union wanted copies. Respondent declined to do so. Its action is urged as a refusal to bargain. The contention is without merit. Respondent was not required to duplicate its records, at its own expense, for the convenience of the UFW.[55] Its refusal to do so did not violate the Act.

We turn now to an application of the recited principles to Respondent's conduct in responding or failing to respond to the Union's "Request for Information."

Item 1 of the "Request" sought a list of bargaining unit employees together with the age, sex, date of birth, residence, social security number, classification, current wage rate and date of hire of each unit employee. This information was relevant and necessary for intelligent bargaining.[56]

As of July 18, 1977, Respondent's payroll records were available to the UFW for inspection and copying. From these records it was possible to learn the name, wage rate, and social security number of current employees.[57] Its health plan enrollment cards were made available. These showed date of hire and date of birth of the covered employees. Sometime between July 18 and October, 1977, 3 x 5 employee cards setting forth the employee's date of hire were made available. This was the total hire date information in its possession. The 3 x 5 cards were the only employee records containing employee addresses. Kawano had no records showing the sex of its employees.

At the bargaining session of July 15, 1977, the Union was told what records were available and what information they contained. During that meeting Respondent stated that most of its employees were classified as general workers and that the names of those otherwise classified were ascertainable from their wage differentials as shown on the payroll records; however, Respondent did not state the

---

[54] Lasko Metal Products. Inc., 148 NLRB 976, 979.

[55] United Aircraft Corp., 192 NLRB 382, 389-390 (1971).

[56] Royal Inn of South Bend, 224 NLRB No. 103; Boston Herald Traveler Corporation, 110 NLRB 2097 (1954); Adams Dairy, 4 ALRB No. 24 (1978); Robert E. Hickam, 4 ALRB No. 73 (1978); O. P. Murphy Produce Co. Inc., supra.

[57] A great many of the employees had no social security number. This was indicated in the appropriate column in the following fashion: 000-00-0000.

classifications of employees other than general workers, nor did it offer any explanation for the rate differential enjoyed by any worker. Its failure to have done so violated Sections 1153 (e) and (a), and Section 1155.2 (a).[58]

As of October, 1977, additional employee records were available to the UFW i.e., employee compensation, cards, W-2 forms and the 3 x 5 cards.

With the exception of its failure to provide information regarding the classification of some field employees, Respondent met its obligation to provide the information sought regarding unit employees.[59] In the context of the failure of the UFW, though aware of the availability of the records, to examine them until months after they were available, it cannot be said that the time lapse between the UFW's demand and Respondent's response was such as to constitute an independent refusal to bargain. A refusal to furnish or a delay in furnishing relevant information violates the Act because such conduct is said to obstruct the bargaining process by preventing the other party from bargaining intelligently and expediciously. However, a delay cannot have the proscribed effect when the requested information is not examined until long after it is made available. The UFW's failure to examine the materials produced, and then only cursorily, until February, 19/8, suggests that its request was intended only to harass Respondent rather than evidencing a bona fide need for the information sought.[60] It is enough here to hold that its non-utilization of the data is a factor supporting the conclusion that Respondent's production of part of the information in July, 1977, and the balance in October of that year did not violate the statute.

The "Request" sought a summary of fringe benefits offered unit employees. This information was supplied for the most part at the initial bargaining meeting or shortly thereafter. However, Respondent has consistently refused to disclose the premium cost of its health and welfare plan.

The National Labor Relations Board, in Cone Mills Corporation, 169 NLRB 4-4-9 (1968), found the employer's refusal to supply information as to cost, actuarial assumptions and employee census figures to be a refusal to bargain, rejecting the employer's argument that all the union needed to know was the benefit level. In Nestle Company Inc., 238 NLRB No. 19 (1978), the National Labor Relations Board reasserted this principle when it held the employer's refusal to furnish information on the cost of the employer's group health insurance plan violated the employer's duty to bargain. The National Labor Relations Board found the premium rate to be presumptively relevant since it constituted wages. It also found the premium cost to be

---

[58] N.L.R.B. v. Tex-Tan. Inc., 318 F.2d 472 (1963); United Aircraft Corp., 192 NLRB 382 (1971).

[59] N.L.R.B. v. Robert F. Abbott Pub. Co., 331 F.2d 209 (7th Cir. 1964)

[60] Dynamic Machine Co., 221 NLRB 11443 (1975).

actually relevant in Nestle since the union contended that if the employer could get the benefits cheaper than could the union, the union would allocate that cost differential to other benefits which they were seeking.[61]

The cost figures were actually as well as presumptively relevant in the present case. The UFW was seeking a plan with a cost-benefit ratio most advantageous to its members. No comparison of the two plans on this basis is possible without knowing the cost of Respondent's plan. Respondent, during the course of negotiations, made no attempt to rebut the presumption of relevance attaching to premium cost as an element of wages. Rather it sought to have the UFW provide it with legal authorities supporting its position. This posture misconceived the respective burdens of the parties. Respondent violated its duty to bargain in refusing to furnish the UFW with information showing the cost of its health insurance program. Moreover, Respondent's conduct in refusing the requested information is an indicia of bad-faith bargaining. Respondent was represented by competent counsel during the course of negotiations. His position regarding this subject matter, i.e., attempting to shift the burden to the Union to explain relevance, is inconsistent with his professional competence and supports an inference that the position was asserted for the purpose of obstructing negotiations. This conduct is one of the pieces of evidence relied upon in concluding that Respondent failed to bargain in good faith.

The "Request" sought the same wage and related information for Respondent's non-bargaining unit personnel as it sought for unit employees. As noted below, Respondent's admitted refusal to bargain regarding office clerical employees violated Section 1153 (e). Since the clerical employees were appropriately part of the certified unit, information regarding their wages and related conditions was presumptively appropriate, and the failure to provide it is an independent violation of Sections 1153(e) and (a), and Section 1155.2 (a).[62]

Information concerning the wages and related conditions of non-unit supervisors is not presumptively appropriate. The UFW, prior to February 1, 1978, made no attempt to establish the actual relevance of the information.

On October 12, 1977, Respondent proposed that supervisors should perform no unit work except that which they had previously performed, provided that such work could not be performed if the effect were to cause the layoff of bargaining unit members.

On February 1, 1978, the UFW explained the relevance of the supervisor information in terms of being able to assess

---

[61]Both the plan in Nestle and that of Kawano were noncontributory.

[62]The Respondent's failure to supply requested information regarding packing shed employees is discussed below in connection with the discussions of Paragraph 10(i) of the complaint.

the likelihood that Respondent, despite its proposal, would encroach on unit work. It argued that depending upon whether the wage differential between the worker and the supervisor was large or small the Employer might be motivated to substitute a supervisor for a worker. Such action could still be taken under Respondent's proposal; it contained nothing which restricted the hiring of additional supervisors or the promotion of workers out of the unit by making them supervisors. This explanation established the actual relevance of the information relating to supervisors sought by the Union. Thus, effective February 1, 1978, and continuing to July 31, 1978, when Respondent proposed essentially the same "Supervisor" language as that proposed by the UFW, Respondent violated Sections 1153 (e) and (a), and Section 1155.2 (a) by failing or refusing to supply the UFW with requested information regarding supervisors.[63]

Item 5 (a) requested information regarding Kawano's crops, the acres per crop and a yearly schedule of crop operations. Respondent substantially complied with this request at the initial bargaining session in June, 1977, and during a ranch tour conducted about a month later. The same information was supplied the new UFW negotiator in 1978.

The UFW requested Respondent's schedule of piece rates. The information was never supplied in any direct simple fashion, nor does Respondent adequately explain its failure to produce this presumptively relevant information. While it is correct, as Respondent asserts, that the piece rate was ascertainable by making a series of calculations using the raw payroll records supplied by Respondent, a far simpler method of transmitting the information would have been Respondent's statement of its piece rates in a simple declaratory sentence which could have been done without effort or expense. By failing to so respond, Respondent refused to bargain in good faith.[64] Its failure to supply the requested rate is a circumstance appropriately considered in determining whether Respondent engaged in surface bargaining.

Item 5(c) requested 10 pieces of production data. For the most part the items listed are repeats of items sought elsewhere in the "Request." With respect to others, it is not clear from the record that Respondent maintained the information.

A list of the pesticides used by Respondent was requested. From time to time during the course of negotiations, Respondent promised the Union such a list. However, pesticide information was not provided until September, 1978, when the Union was given copies

---

[63] Prior to receiving an explanation from the UFW which established the actual relevance of the supervisor information, Respondent had no duty to supply it. See: San Diego Newspaper Guild, etc, v. N.L.R.B., 548 F.2d 863 (9th Cir. 1977). In view of the tentative agreement reached by the parties, no purpose would be served by directing its production.

[64] Food Employers Council. Inc., 197 NLRB No. 98 (1972): B. F. Goodrich, 89 NLRB No. 139 (1950).

of invoices showing the pesticides used by Respondent's subcontractor since 1975. Respondent's agreement from the outset to supply the requested information manifests its understanding that the information was relevant. Respondent's unexplained delay in supplying this information was a refusal to bargain about a mandatory subject matter. The delay cannot be defended, as Respondent seeks to do, on the ground that the Union did not avail itself during ranch visits of the opportunity to make an on-the-spot inquiry regarding substances used. It is not necessary that the UFW repeatedly request relevant information or avail itself of other opportunities to acquire it before Respondent's failure to supply the information is a refusal to bargain.[65/] An employer's obligation to supply relevant information arises upon request and is not satisfied until the information is furnished or the union either actually or constructively withdraws, or otherwise waives, its request by reaching agreement on the subject matter covered by the request.

The final information found in the UFW's "Request" is a list of equipment used in Respondent's operations. Respondent never contended that such information was not actually relevant, nor did it refuse to supply it. However, it has never been supplied. The information has relevance in making intelligent determinations regarding whether particular contract classifications should be proposed, e.g., truck drivers or tractor drivers. Respondent's continued failure to supply this information is an ongoing refusal to bargain. With respect to this information it is no defense to say that no list of major equipment existed. While Respondent may not be required to engage in burdensome work to satisfy a request for information, it does have an obligation to provide requested information when that information can be assembled and provided without great inconvenience or cost.[66/] It is unlikely that more than a few minutes would be required for Respondent to produce a list of its major equipment sufficiently detailed to meet its bargaining obligation. Its failure to do so violated Sections 1153 (e) and (a), and Section 1155.2 (a).[67/]

To summarize: Respondent violated the Act by failing to provide relevant information as requested regarding the classification of field employees other than general field labor, the cost of its health insurance program, the wages and related conditions of its 'supervisors, the schedule of its piece rates, a list of pesticides used, a list of its major equipment, the wages and working conditions of office clericals, and information regarding the shed operations. The time periods during which the violations occurred varies with the earliest date being June 29, 1977. In some instances the violation had not ended by the commencement of the hearing.

[65/] N.L.R.B. v. John S. Swift Co., 277 F.2d 641 ( ).

[66/] Generac Corp., 215 NLRB No. 41 ( ).

[67/] Since Respondent violated the Act by failing to provide information regarding its major equipment, it is unnecessary to decide whether the failure to provide information regarding the number of hoes and other hand tools it had on hand independently violated the statute.

3. Constructive Discharges:

Paragraph 10 (d) of the complaint alleges that Respondent isolated and constructively discharged Javier Acosta. Felix Hernandez, Refugio Vasquez, Jose Juarez Aleman and Antonio Zamarrippa. With respect to the allegations of Paragraph 10 (d), I make the following:

Findings Of Fact: Each was a member of the UFW negotiating committee and attended the UFW negotiations with Kawano. Each had previously testified against Kawano in unfair labor practice proceedings, and Respondent has previously been held to have violated the Act with respect to each.[68/] Respondent was well aware of the Union and protected concerted activity of each of the alleged discriminatees.

The five workers were hired in late July, 1977, and assigned to work in cherry tomatoes under Juan Rodriguez. They were, as the Board has previously held, segregated and isolated from another cherry tomato crew of IS to 20 workers working for Rodriguez. The five worked the entire cycle of the cherry tomato crop, performing such duties as hoeing, staking, tying and harvesting. Upon completion of the cherry tomato harvest at the end of December, the five worked in strawberries for two or three days. Isolation from the other workers in Rodriguez's crew continued during this period. Their work was the same as that performed by the balance of the crew, i.e., pulling the plants "through the plastic."

It rained on January 3. About noon the five alleged discriminatees left work as did the other workers in Rodriguez's crew. It continued to rain for the next four or five days.

None of the alleged discriminatees returned to work for Kawano. Acosta went to work for the UFW a short time after leaving Kawano. On January 9 Hernandez and Aleman went to work for another grower on jobs obtained with the help of the UFW. There is no testimony regarding the subsequent employment of Zamarrippa or Vasquez.

The testimony of Aleman regarding why he left Kawano is contradictory. On direct examination he stated he left because he felt discriminated against and not because it was wet. On cross-examination he testified he told Rodriguez he was leaving because it was raining hard and all the people were leaving. On redirect he testified he left because he felt discriminated against and not for the reason given Rodriguez. Finally, on re-cross he conceded that his statement to Rodriguez was the real reason for leaving work. No testimony was elicited regarding his failure to return to Kawano when the rain ceased some days later.

At the time he ceased working for Kawano, Aleman and the other four workers had been isolated from the balance of

---

[68/] Kawano. Inc., 4 ALRB No. 104 (1978).

Rodriguez's crew for more than five months. Isolation had become a regular working condition by the time he moved from cherry tomatoes to strawberries. This fact coupled with Aleman's admission when questioned by Respondent's counsel that he told Rodriguez he was leaving because it was raining leads me to discredit his testimony that he left because he felt discriminated against. I find that Aleman left work at Kawano because of inclement weather and but for the rain would have continued to work though continuing to be isolated.[69] He decided not to return to work at Kawano and went to work at the other grower's.

Hernandez testified he left work because it was raining. It continued to rain for three or four days and he did not return. During this period he visited the UFW hall and learned there was work at another grower. He decided not to return to work at Kawano and went to work at the other grower's.

Acosta testified he left work because he felt it was not right for the rows to be so muddy and to be isolated all the time. However, he filed a claim for unemployment insurance in which he said he left work because it was raining and the person who took him to work had quit, so he had no way to get to work. He admitted that he lied on his unemployment claim in order to obtain benefits, stating that if he had given the true reasons, he would not have received benefits. At another point he testified that the real reason he quit was because he and his fellow workers were discriminated against as if they "stunk," they were isolated and because Respondent irrigated the fields when they were already wet.

Acosta's admission that he lied for the purpose of obtaining unemployment benefits is a basis for not crediting his testimony regarding his motivation for quitting and testimony that Respondent irrigated its strawberry field while it was raining.[70] Such testimony is designed to establish a more onerous work situation directed toward him, i.e., to establish conditions which would warrant a conclusion that he was constructively discharged. The advantages to Acosta from such testimony are certainly greater than those flowing from having lied to procure unemployment benefits. In addition, he is now an employee of the Intervenor and has an additional motivation for coloring his testimony. Finally, with respect to the question of irrigation, it ! makes no sense whatsoever that Respondent would endanger its crop to drive Acosta and the other four off the job. Such an action would be inconsistent with the rationale urged by the General Counsel for their isolation. Therefore I do not credit the testimony of Acosta that the

---

[69] An additional reason for not crediting Aleman's testimony that discrimination motivated his departure from Kawano is the unreasonableness of the testimony. Nichols v. Pacific S. R. Co., 178 C. 630. He had endured isolation in the cherry tomatoes for approximately five months under working conditions more onerous than those to which he was accustomed. The strawberry work which he was called upon to perform was no different from the work performed by others working in straw berries. His isolation was no greater. The only new factor in his work situation was the rain.

[70] Evidence Code Section 780 (k).

strawberries were being irrigated while it was raining. Conflict in the testimony on this point is resolved in favor of Rodriguez's testimony that the fields were not irrigated.

Vasquez testified that the tomato harvest ended at the end of 1977 because it began to rain hard. It was raining and windy when he began in the strawberries on January 2. The field was also being irrigated.[71] He worked two or three days and then had to quit because of rain and water in the rows. He was also tired of being isolated from the other workers. On cross-examination Vasquez testified that he quit because it was raining, and if it had not been raining he would not have left the job.

Antonio Zamarrippa did not testify.

Conclusions: A constructive discharge occurs when the employer imposes such intolerable work conditions upon an employee that the employee is forced to quit. When such conditions are imposed because of the employee's union activity, Labor Code Sections 1153 (a) and (c) are violated. Sierra Citrus Association, 5 ALRB No. 12 (1979). A constructive discharge can occur if the work conditions imposed make the situation either "physically or emotionally impossible." P. E. Van Pelt, Inc., 238 NLRB No. 105, 99 LRRM 1576.

To determine whether the five workers or any of them were constructively discharged, we start with the recited reasons each gives for having left work.[72] None of the alleged discriminatees contends he left work because of the working conditions in the cherry tomatoes. Thus, the extensive testimony and argument regarding whether the work conditions in that crop were onerous is not material or relevant to the issue of constructive discharge.

The Board in Kawano. Inc., 4 ALRB No. 104 (1978), held that Respondent isolated each of the five workers named herein and that the isolation violated Sections 1153 (a) and (c) of the Act. That decision, involving as it does the same cherry tomato work during the fall and winter of 1977 and the same persons involved herein, is binding and

---

[71] For the reasons spelled out above asquez's testimony regarding irrigation during the rain is not credited.

[72] See Merzoian Brothers Farm Management Company. Inc., 3 ALRB No. 62 (employee testified that he left the labor camp where he was living because he feared for his personal safety; the Board found that the threats and harassment assigned by the employee as his reason for quitting to amount to a constructive discharge); Frudden Produce. Inc., 4 ALRB No. 17 (1978) (the employee left work because the tires on his pickup truck were slashed and because as a result of being followed by a supervisor, he was almost involved in a collision); Adam Dairy, 4 ALRB No. 24 (1978) (Board found that an employee who left work as a result of a reduction in his wage rate and a change of assignment to work which would have adversely affected a pre-existing skin condition known to management did not quit but was constructively discharged).

the illegal isolation has been established. If Respondent has failed to comply with the Board order issued in the earlier case, compliance proceedings are available. However, the illegal isolation of the alleged discriminatees is relevant in the instant case if it constituted a reason why any of the five left his employment with Kawano. Such is not the case. The testimony assigning isolation and discriminatory treatment as a reason for quitting has not been credited.

Credited testimony establishes inclement weather as the reason each of the alleged discriminatees left work.[73/] The rain was a work condition imposed by nature rather than by the Employer. Quitting because of the rain does not constitute the type of involuntary action by an employee which can transform a "quit" into a "constructive discharge." Paragraph 10 (d) of the First Amended Complaint is dismissed in its entirety.

4. Refusal To Rehire Identified UFW Supporters:

Paragraph 10(e) of the complaint alleges that Respondent has refused, and continues to refuse, to rehire identified UFW supporters, thereby refusing to bargain. The conduct is also urged as evidence of animus toward the UFW indicative of a failure to bargain in good faith. With respect to the allegations of Paragraph 10(e), I make the following:

Findings Of Fact: The Board has previously found that Respondent violated Sections 1153(a) and (c) of the Act in failing to rehire the group covered by Paragraph 10(e) and directed their reinstatement.[74/]

The question of rehiring the workers covered by the earlier decision was raised by Beauchamp at the first bargaining session.[75/] Geerdes responded that Kawano's practice was to hire those present at the ranch at the time workers were needed. He advised the workers UFW representatives present at the meeting that they would be hired if additional workers were needed and they were present.

On June 22, 1978, Geerdes wrote Heumann that Kawano would not discriminate against any of the individuals covered by the Administrative Law Officer's decision in the earlier case. He asserted that none had applied for reinstatement. Geerdes agreed to advise each of the individuals directly of employment opportunities and the procedure for making application for work. To enable Kawano to accomplish this, Geerdes requested that either the UFW or the ALRB provide him with the current address of each of the individuals to be

---

[73/] It is not clear from the record that each of the five had decided to quit at the time he left the fields because of the rain. There is the possibility that each quit only after receiving another job commitment.

[74/] Kawano. Inc., 4 ALRB No. 104 (1978).

[75/] June 29, 1977.

offered a rehire opportunity. The addresses do not appear to have been provided. At the bargaining session of November 3, 1978, Geerdes renewed his request for the information.

Conclusions: The charge in Case No. 77-CE-42-Y alleging Respondent's refusal to bargain was filed December 22, 1977. Thus, Employer conduct antedating July 22, 1977, is not appropriately considered as the basis for finding a violation of the statute.[76/] It would be appropriate, if necessary, to use such conduct to shed light upon events occurring within the Section 1160.2 period.[77] Since there is substantial evidence establishing Respondent's failure to bargain in good faith without reference to events outside the Section 1160.2 period no purpose is served by examining those events for indicia of Employer animus.

Turning to Respondent's conduct since July 22, 1977, vis-a-vis those persons found by the Board to be discriminatees, the General Counsel did not prove that Respondent's failure to reinstate them violated Section 1153(e). Respondent filed timely exceptions to the Administrative Law Officer's decision which issued in January, 1978. It was not until December, 1978, that the Board issued its decision in the case. During the period when the Board had under consideration Respondent's exceptions to the Administrative Law Officer's opinion, there is no evidence in the record which warrants the inference that the failure to rehire the 53 discriminatees was motivated by a desire to undermine the UFW rather than by the fact the issue of whether rehire was required was unresolved.

The issue of rehire came up infrequently during the negotiations. When it did, the evidence is that Respondent stated the individuals would not be subjected to discrimination if they applied for employment. Requests for the addresses of those whom the UFW wanted rehired met with no response. Irrespective of Respondent's other conduct during negotiations, its conduct regarding the discriminatees does not manifest a desire to frustrate negotiations. Nor does the record support the conclusion that it refused to bargain regarding rehire of the 53 individuals.

The allegations of Paragraph 10(a) are dismissed.

5. Interference With Access:

Paragraph 10(f) of the complaint alleges that "in the course of the period of negotiations" Respondent interfered with UFW access necessary for the workers' inclusion in the bargaining process by refusing to honor an access agreement negotiated by the parties on July 15, 1977.[78/] This conduct is alleged to be evidence that

---

[76/] Labor Code Section 1160.2.

[77/] N.L.R.B. v. MacMillan Ring-Free Oil Co., 394 F.2d 26 (9th Cir. 1968).

[78/] The pleading states the date as January 15, 1977. This is erroneous. The proof establishes the date the parties -- (continued)

Respondent engaged in surface bargaining and as an independent violation of Sections 1155.2 (a) and 1153(e).

Paragraph 10(g) alleges that Respondent "(r)efused to permit UFW representatives to visit employees where they live on lands to which access is controlled by Kawano, Inc." This conduct is alleged to be a refusal to bargain as well as an indicia of Respondent's failure to bargain in good faith.

With respect to the allegations of Paragraphs 10(f) and 10(g), I make the following:

Findings Of Fact: June 29, 1977, Meeting--The question of UFW access to Kawano properties was raised at the first meeting between the parties on June 29, 1977. The Union said it needed access because the majority of the workers were non-documented and lived on the premises. The only way the UFW could reach them was to come onto the property. The UFW wanted access in order to discuss the progress of negotiations with the workers and get input from them regarding the negotiations.[79] The Union also wanted to distribute pamphlets and generally discuss the Union with the workers. Beauchamp expressed the hope that an interim access agreement could be reached. He made no specific proposals during the meeting.

July 5 Incident--On July 5 there was an encounter between UFW Representatives Beauchamp, Vasquez, Aleman, Chavez and Zamarrippa, and Kawano Supervisors Imoto, Jay Kawano and Castellon. The UFW representatives arrived at Rancho Santa Fe sometime around 9:00-9:30 a.m., and parked along a dirt road adjacent to Kawano property.[80] A wire fence separated the road from the Kawano field. Shortly thereafter workers arrived from points inside the fence and began working in the area in front of the UFW representatives. Beauchamp approached the fence to talk to them. The three Kawano supervisors drove up on the inside of the fence in two pickups and parked between Beauchamp and the workers. They dismounted and Jay Kawano came through the fence to talk to Beauchamp. He asked whether Beauchamp had a court order to talk to the workers. Beauchamp said he did not need one. Kawano then pointed to Chavez and said he had a gun. Chavez was holding a camera which he handed to Beauchamp. Kawano pointed to Chavez's shirt at the belt line. Beauchamp raised the Chavez's shirt and there was no gun. Kawano reiterated that Chavez had a gun and pointed to his hip. Beauchamp repeated that Chavez had no gun. He then told his fellow representatives that they should leave the area.[81]

---

[78] (continued)--negotiated and reached tentative agreement on an access agreement as July 15, 1977.

[79] testimony of Alex Beauchamp, lead negotiator for the UFW during 1977.

[80] Imoto placed the time as about 9:00 a.m.; Beauchamp at 6:30 a.m.; and Vasquez at 9:30 a.m.

[81] These findings rest on Beauchamp's testimony.

Imoto testified he saw a gun in Chavez's hand and saw it pointed right at Kawano. Beauchamp said it was a camera. Imoto told them to stay where they were, that he was going to call the police, but they got into their vehicle and departed.

Chavez was subsequently charged with brandishing a firearm and carrying a firearm without a license. The charges were dismissed when he pled guilty to the lesser offense of disturbing the peace.

July 5-July 15, 1977--During the interval between the first and second negotiation meetings there was an exchange of correspondence, initiated by Geerdes, regarding access. Geerdes inquired about the limits, if any, the UFW was proposing with respect to the number of organizers taking access and with respect to time Limitations on access periods. He also wanted the UFW proposal reduced to writing. Beauchamp responded by letter which accused Geerdes of stalling, but which did not answer any of the questions Geerdes raised. Geerdes hand-delivered a written response. On July 15 immediately preceding the negotiation meeting set for that date Geerdes and Beauchamp met prior to the negotiation meeting and discussed the contents of Geerdes' letter as well as the "gun" incident before commencing the bargaining session.

The Interim Access Agreement--At the July IS negotiations, Kawano presented an interim access agreement, providing for: (1) access at each of the ranches under conditions paralleling the ALRB's pre-election access regulation; (2) an expiration date of September 1, 1977, with a provision for its extension thereafter; (3) selection of designated areas at each ranch for meetings with workers; (4) a limitation of one representative for each 15 workers, not to exceed five representatives; (5) identification badges to be worn by UFW representatives; and (6) prior notification of an intent to take access so that gates securing the fields could be opened to provide ingress.

After a caucus the UFW responded: Beauchamp had problems with the time limitations proposed by Kawano. He stated he had the right to visit the workers at the place where they lived without any time limitation. Beauchamp also voiced objection to limiting the UFW to a designated area when talking to the workers. This objection was voiced in terms of wanting to visit the workers where they lived, noting that it would be intimidating for them to have to come to a designated area to speak to a Union representative because of fear of surveillance by supervisors. The UFW agreed to designate its authorized representatives.

Beauchamp had a problem with giving notice prior to access. He said he saw no need to drive on the premises, the representatives could walk on the ranch and tell the first supervisor they saw who they were. Geerdes suggested the problem was not insurmountable.

Beauchamp reiterated his opposition to limiting access in the evening to one hour after work, again talking about the numbers
//
//
//

of people living on the properties and the difference between visiting them and having after-work access to people who commute to work.[82/]

There was additional discussion on the question of designating a meeting area as opposed to permitting UFW representatives to go where the workers were located. The UFW caucused and returned to state that although the Employer proposal was inadequate, the UFW was prepared to accept it with the hope that it was the first step toward reaching some middle ground in other areas of negotiation. Geerdes noted that it was an agreement with which neither of them were happy. He requested that no access be taken until he could meet with the foremen to explain the agreement.

Geerdes drafted the agreement in final form and forwarded it to Beauchamp for signature on July 18. It was executed by Beauchamp on July 26.

Access By UFW Representatives--On July 29, 1977, in response to a UFW request, Kawano arranged for its employees available for a Union meeting called to elect delegates to the UFW's annual convention. The meeting was held during work hours.[83/]

During the first or second week of August, Beauchamp visited Bonsall Ranch between 6:30 and 7:00 a.m. He spoke to Juan Rodriguez, identifying himself as an UFW representative.[84/] He told Rodriguez he wanted to take access to talk to the workers. Rodriguez said he was not authorized to let him on the premises without a written order from Kawano. Beauchamp explained there was an agreement with Kawano permitting him to talk to the workers. Rodriguez denied awareness of an agreement. Beauchamp asked him to contact the office. Rodriguez said he would have to go to a phone. He departed. Beauchamp said he would do nothing until Rodriguez returned and went back to his car to wait.

Rodriguez returned about 10:00 a.m. and told Beauchamp that Reggie (Kawano) had not authorized him to allow Beauchamp on the premises. Beauchamp reiterated the existence of an access agreement, but said he would not force the issue. He told Rodriguez that he would discuss the matter with the Kawano attorney and departed.[85/]

[82/]Beauchamp's testimony is inconsistent. He contends the interim agreement did not apply to camp site visits, while also objecting to the proposed agreements one hour after work time limitation because it provided insufficient time for such visits.

[83/]Beauchamp placed the date as July 30, 1977.

[84/]Rodriguez is admitted to be a supervisor within the meaning of the Act.

[85/]These findings are based upon credible testimony by Beauchamp.

On August 18 Beauchamp related to Geerdes his problem with Rodriguez. Geerdes said he would look into it. Two or three days later Beauchamp and three other UFW representatives visited Bonsall about 6:30 a.m. and again spoke to Rodriguez, telling him that they wanted to talk to the workers. Rodriguez replied they were already working, saying work had started earlier than usual that day. Beauchamp said he would wait until noon to speak to them and asked when the lunch break occurred. Rodriguez said it depended on when the food wagon came by which was around noon. Rodriguez asked whether Beauchamp had a written order from Kawano. Beauchamp told him that the Company attorney assured him that UFW representatives had a right to go onto the property. Rodriguez said that he could not let them on without a written order. Beauchamp said they were going to take access at noon time. He told Rodriguez that they would follow the lunch wagon onto the premises. They did so. The UFW representatives were on the premises at the designated meeting area during the entire lunch period. Rodriguez was also present, eating his lunch about 10 feet away and would not leave the area although requested to do so by Beauchamp. Beauchamp spoke to the workers, but none of them responded or asked any questions.

That afternoon about 5:30 Beauchamp and the other representatives went to Santa Fe Ranch. The gate was locked so they parked outside and walked to the area designated for meeting with the workers, i.e., the area in front of the "little stores." There were about 100 people present. Castellon was among those present.[86/] Beauchamp introduced himself and explained why he was there. Castellon said he was not authorized to let anyone talk to the workers without a written authorization from Kawano. Beauchamp said there was an access agreement and that Castellon was supposed to be aware of the agreement. He asked Castellon to leave the area, saying that he had a right to talk to the workers without interference from him. Castellon denied that he was a foreman and declined to leave the area. Beauchamp moved to another location about 100 feet away in order to speak to the workers without Castellon hearing. Only about a half dozen workers joined him, so he moved back to the store area to speak to the larger group even though Castellon was still present among a group buying provisions at the store. Castellon was seated at a table in front of the trailer next to the store. Beauchamp began speaking to a portion of the large group gathered about 25 feet from the front of the store. Beauchamp read the workers a settlement agreement entered into by Kawano in another unfair labor practice case and told them of the resultant reinstatement of some of the employees. Castellon interrupted by saying that Kawano did not sign the paper. Beauchamp responded that one of Kawano's representatives had signed it. Castellon again interrupted to contradict statements by Beauchamp regarding insurance costs and benefits.[87/]

When the parties met on August 23 Beauchamp again told Geerdes about the UFW's access problems. Geerdes said he would

---

[86/]Castellon is admitted to be a supervisor within the meaning of the Act.

[87/]These findings are based upon Beauchamp's testimony.

check out the complaints.

Sometime between August 23 and the first of September, Beauchamp again visited Bonsall, arriving about 7:00 a.m. He saw Rodriguez and told him he wanted to take access at noon. Rodriguez said he was not responsible and that Beauchamp could do what he wanted. Beauchamp was waiting for the workers when they came to the lunch area. Rodriguez was with them and Beauchamp asked him to leave so he could talk to the workers. Rodriguez refused; he stayed in the area during the entire lunch break.

About 5:30 that afternoon Beauchamp and the committee again visited Santa Fe. The group proceeded to the "designated area" on foot. Beauchamp told Castellon he wanted to speak to the workers and asked Castellon to leave the area. Castellon said he had a right to be there and did not leave. Beauchamp talked to the workers for ah out 45 minutes.[88/] Castellon interjected some comments when Beauchamp spoke about pesticides. When Beauchamp continued talking, Castellon put his transistor radio to his ear and listened to a sporting event.[89/] Castellon testified credibly that he is charged with staying on the premises until the workers depart at the end of the day, at which time he locks the gate. This is generally any time between 4:00 and 8:00 p.m.

At the bargaining session of August 23, Beauchamp again related the problems he was having with foremen. Geerdes acknowledged that some of the foremen failed to understand the situation and promised to clear it up that day. Thereafter, UFW representatives visited the various properties without incident.

Workers Living On Ranches--During visits to each of Respondent's ranches Beauchamp saw evidence of persons living in areas adjacent to the fields. At San Luis Rey, along the bank of the creek that divides the ranch, he saw plastic lean-tos, pots, pans and a make shift fireplace. There were clothes hanging out to dry. He also saw a lunch wagon enter the premises after working hours.

Between August and November, 1977, Beauchamp visited Ivey Ranch about three times. He saw make-shift shelters in a ravine just beyond a cultivated area; he saw persons cooking dinner; he saw clothing hanging out to dry; he saw persons buying provisions from a lunch wagon, and on one occasion he saw a station wagon displaying clothes for sale.

At Bonsall there was a clearing in front of the shed where Beauchamp met with workers. Alongside the shed someone had constructed a make-shift shelter from the plastic material used to cover tomato plants. There were pots, pans, personal effects and beds inside the shed.

[88/] These findings are based upon credible testimony of Beauchamp.

[89/] Speculative testimony by General Counsel witnesses that Castellon was using a tape-recorder is not credited.

Beauchamp visited Santa Fe several times from August through December, 1977. On each visit he saw evidence that people were living on the ranch.

An agent of the United States Border Patrol personally apprehended 20 to 30 undocumented workers living in a canyon on Santa Fe Ranch which was surrounded by cultivated fields. Some of the workers were preparing breakfast about 50 to 100 feet from the edge of cultivated areas. A second Border Patrol agent testified to a raid at Ivey Ranch during which undocumented workers were apprehended in campsites located adjacent to the fields.

Beauchamp took access approximately six times from September through December, 1977, without interference. He admitted that there were other times when access could have been taken had he desired to do so. On no occasion was he asked to leave. During the same period other UFW representatives visited the ranches without incident. During the latter part of August, 1977, Velasquez and other UFW representatives went to Santa Fe to talk to the workers in their living areas. Imoto and Castellon were present. Velasquez asked Imoto for permission to meet with the workers. Imoto said he could talk to them for an hour. Imoto left, but Castellon remained. He was working at the time, and when asked to leave, responded that his house was there and that he could not leave his house. Velasquez met with the workers for about 40 minutes and left when he finished what he had to say.[90/]

Velasquez visited Santa Fe on subsequent occasions under similar circumstances. On each occasion Castellon was in the area and declined to leave when asked. Velasquez testified that Castellon used a tape recorder on one occasion. Castellon denied doing so and stated he was listening to a portable radio. His actions in connection with the instrument, as described by Velasquez, are consistent with finding it to be a radio and not a tape recorder.[91/] Castellon's testimony that he lived in the area where Velasquez was speaking to the workers is not controverted.

Velasquez also talked to the workers at Ivey Ranch after work on three occasions. He sought them in their "little houses" in a canyon on the ranch.

One afternoon in November, Scott Washburn, Beauchamp and two other UFW representatives visited Santa Fe to take warm clothes to the workers and to discuss negotiations. Work had finished for the day. They drove onto the premises to the area in which the store is located, i.e., a semitrailer. One of the representatives asked where the workers were and was told they were about three-quarters of a mile away. The group drove to the location to which they had been directed, Someone approached and said the gate was to be locked. When Washburn asked him to postpone locking the gate for an hour or so, the person responded that he had orders to lock the gate at that time. Washburn deposited the clothes, drove his car off the premises, parked and

---

[90/]Velasquez testimony.

[91/]Holding it close to his ear and listening.

walked back to the gathering. Since he customarily does not talk to workers after dark, the time which he spent driving out and walking back shortened his meeting time with the workers.[92/]

Request For Kevs--At the December 15 bargaining session, Beauchamp requested that the UFW be given keys to each of the ranches. The request was motivated by the fact that the days were shorter, and it was dangerous to walk the necessary distance to where workers lived. Neeper, now serving as Kawano's spokesman, declined the request. He said Kawano would provide keys to the extent they were required to do so by law. Neeper proposed that the interim access agreement be renewed. The UFW was not prepared to do this because of professed bad experience under the agreement. The parties were in disagreement regarding whether the agreement was still operative, the UFW contended that it had expired, Kawano contended it was still in effect.

On December 16 Neeper in a letter to Washburn declined to provide the UFW with keys to the ranches. Neeper denied there were people living on any of the ranches. He stated his understanding of the purpose of the UFW demand in the following language:

> As we understand it you want the keys to create a situation where any one of your choosing can come on to our premises at any time for any reason and do anything on our premises that the persons choose.
>
> As I understand it you need the keys so that an unlimited number of cars can come on any portion of the Kawano premises at any time of the day or night and drive in any manner and do anything, including any damage that the individual drivers care to.

Having said this, Neeper went on to say that the Company was prepared to consider any more 'limited key proposal which the Union wished to make.

Neeper testified he understood the Union's proposal to mean that it wanted to come onto the cultivated areas with unlimited freedom since such areas were the only areas under Kawano's control. Neeper said he understood the Union's reference to persons living on the property to mean persons living on the cultivated areas, and his denial that there were persons living on Kawano premises was made in that context. He further testified that he thought Washburn so understood his remarks. Both Neeper and Geerdes were aware that there were people living in the brush areas adjacent to the Kawano fields which were inaccessible except through the Kawano fields.[93/]

[92/] Washburn testimony.

[93/] This testimony of Neeper is incredible. There can be no question but that he knew what the UFW was talking about in terms of their request to visit people living on the ranch. His secret and unnatural use of the term "ranch" cannot be accepted, -- (continued)

The record contains no testimony regarding UFW access during 1978. There is no evidence of interference with any attempted access.

Conclusions: We are concerned with two types of access: post-certification access to work areas and access to worker living areas.

The Board initially dealt with' the problem of post-certification access in O. P. Murphy Produce Co., 4 ALRB No. 106 (1978), and said the need for such access would be evaluated on a case-by-case basis. The Board held:

> (A) certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit. Where an employer does not allow the certified bargaining representative reasonable post-certification access to the unit employees at the work-site, henceforth such conduct will be considered as . evidence of a refusal to bargain in good faith. (at p. 8.)

In the present case the parties entered into an interim access agreement which provided for UFW work-site access consistent with the Board's Access Regulation (8 California Administration Code Section 20900), and consistent with the guidelines for post-certification access set forth in 0. P. Murphy, supra. The interim agreement expired September 1, 1977. The UFW continued to take work-area access thereafter in a manner consistent with the terms of the agreement and there is no evidence of Respondent conduct during the period inconsistent with the O. P. Murphy guidelines or the access agreement nor is any alleged. In negotiating and entering into the interim access agreement Respondent did not refuse to bargain or fail to bargain in good faith.

We turn now to an examination of General Counsel's allegations that Respondent breached the agreement by preventing access and by engaging in surveillance while UFW representatives were on its premises.

On one occasion in August, 1977, Beauchamp was denied pre-work access at Bonsall. He was present prior to the commencement of

---

[93] (continued)--especially when he was aware of the persons living adjacent to the property. Patently, there could be no workers living on cultivated ground. The witness' demeanor while testifying was also considered in discrediting the testimony. Neeper's letter of December 16 is evidence supporting an inference of bad faith bargaining by Respondent.

work, but was denied access by the foreman. This incident occurred during the first half of August and sufficient time had transpired for Kawano to have made its supervisors aware of the terms of the access agreement. While the foreman's conduct interfered with employees' Section 1152 rights, it appears to be the only refusal to admit UFW representatives occurring after the effective date of the access agreement. I find the incident de minimis and therefore find that separate remedial action is unwarranted.[94/]

There were four occasions during the latter part of August, 1977, when Kawano supervisors engaged in conduct alleged to constitute unlawful surveillance of UFW representatives during the course of their access taken pursuant to the agreement. These incidents are cited as independent as well as derivative Section 1153(a) violations.

As noted by counsel for Respondent, the interim access agreement does not, by its terms, prohibit supervisors from being present during times UFW representatives were meeting with the workers. However, it is. reasonable to conclude that when the parties used the terra "access," they intended the term to be given its customary meaning in agricultural labor relations, i.e., the meaning which has resulted from enactment of the Agricultural Labor Relations Act and resulting Board regulations and decisions.[95/] Had another meaning been intended it was incumbent upon the party intending such meaning to convey its intent to the other party. Thus, access as used in the agreement is taken to mean access without unlawful surveillance by supervisors.

Generally speaking, intent is not a necessary element in the proof of a Section 1153(a) violation; however, in dealing with the question of whether a. supervisor's presence when union representatives are meeting with workers violates the Act, the Board has said that proof that the supervisor was present for the "purpose of surveillance" is required. Tomooka Brothers, 2 ALRB No. 52 (1976). In Dan Tudor & Sons, 3 ALRB No. 69 (1977), the illicit purpose was proved by evidence the supervisor "intentionally interjected his presence and limited the conversation between the organizer and the workers."[96/] While it is true that Castellon on two separate occasions interrupted Beauchamp's conversation with a group of workers to correct what he thought to be a. misstatement by Beauchamp, there is no evidence that His brief interruption had any impact upon the meeting or that it in any way interfered with Beauchamp's communication with the workers. Thus, I find that Castellon's conduct did not manifest an intent to engage in surveillance and that the General Counsel has failed to meet the burden imposed by the Board in Tomooka.[97/]

[94/]See Mitch Knego. 3 ALRB No. 32 (1977).

[95/]Civil Code Section 1644; 1 Witkin, Summary of California Law 446 (Eighth Edition, 1973).

[96/]Supra, at p. 2.

[97/]Cf. Dan Tudor & Sons, supra.

With respect to Rodriguez, the evidence is that he declined to leave the lunch area when Beauchamp arrived to talk to the workers. He did not speak nor attempt to interfere with Beauchamp's presentation. He was simply "standing by." Where a supervisor is "standing by" at a location where he has a right to be, as is the case here, his presence does not amount to unlawful surveillance. Rodriguez had as much right to be in the area during the lunch break as did the workers.[98]

Having found that Respondent did not engage in unlawful surveillance during the term of the interim access agreement and, thus, did not unlawfully interfere with worker rights under Section 1152, I shall dismiss Paragraph 13 of the complaint so far as it refers to Paragraph 10(f). Since there is no evidence the parties intended the interim access agreement to contain a proscription against supervisor presence beyond that provided by Section 1153(a), it follows that supervisorial presence which did not violate the Act would not violate the interim access agreement.

The General Counsel has failed to prove that Respondent interfered with access to workers by refusing to honor the interim access agreement. The allegations of Paragraph 10(f) of the complaint are dismissed as are the allegations of Paragraph 16 so far as they refer to the allegations of Paragraph 10 (f).

It is apparent that workers were living on properties access to which was controlled by Kawano. For purposes of finding a violation of the statute, it is immaterial whether the workers were living on cultivated property leased by Kawano or on uncultivated areas bordering the fields claimed by Kawano as not within the scope of its lease. It cannot be gainsaid that Kawano had the power to control access to the living areas. It exercised this power by interdicting vehicular access to two of its ranches.[99] Its conduct interfered with employee Section 1152 rights and violated Section 1153(a) of the Act by making it impossible for UFW representatives to drive to the points on Ivey and Santa Fe Ranches where workers were living.[100] The fact that the access denied in Nagata occurred during an organizational campaign rather than during the course of negotiations is not significant.[101] Nor is the fact that foot access was available at both Ivey and Santa Fe. The workers have a constitutional and statutory right to be visited by UFW organizers, and those persons visiting the workers are entitled to" . . . use the customary ways and roads giving ingress and

---

[98] See M. Caratan. Inc., 5 ALRB No. 16 (1979); Mitch Knego,3 ALRB No. 32 (1977).

[99] Vehicular access at Santa Fe was not possible during non-work hours. The gate was locked after workers left for the day. The entrance gate to Ivey was always locked.

[100] Nagata Brothers Farms, 5 ALRB No. 39 (1979).

[101] O. P. Murphy & Sons, supra.

egress to the employees' place of abode."[102/] As Respondent notes, vehicular access was available at all times at Bonsall and San Luis Rey however, this fact does not excuse the denial of similar access at Santa Fe and Ivey. Nor is the fact that the UFW did not request free vehicular access to Ivey and Santa Fe until December 15, 1977, an excuse for Respondent's refusal to honor the request once received.

Respondent explains its refusal to furnish a key to Ivey on the ground that it did not have complete control over ingress and egress because it only occupied a portion of the ranch and that the interests of Kawano's lessor demanded that the outside gate be kept locked. This contention is unpersuasive for several reasons. First, there is no testimony from the lessor that he had concerns about having the entrance gate locked as opposed to closed; second, giving the UFW a key to the gate would not require that the gate be unlocked except during the moments when UFW representatives were passing through. At such times UFW representatives could insure that livestock did not escape and that undesirable elements did not enter; third, the lessor does not appear to have objected to key issuance to the food vendor who daily comes onto the property; and finally, there is no hard evidence that issuance of a key to the UFW would have adversely affected Kawano's lessee status.

Respondent's explanation for not furnishing a key to Santa Fe is equally unconvincing. Respondent wanted Santa Fe locked when management personnel were gone for the day to protect their crops and equipment from intrusions by horsemen and others. Conceding this to be a valid objection, it cannot be concluded that permitting the UFW vehicular access would be destructive thereof. There is no reason, on this record, to conclude that UFW representatives would have done other than open the gate, drive through, close and lock it behind them and proceed to where the workers were living, reversing the process on the way out.

Although reaching the conclusion that Kawano did not present plausible reasons for refusing to permit access to Ivey and Santa Fe, such a conclusion is not prerequisite to finding a Section 1153(a) violation. The test of whether Kawano's refusal to supply keys on and after December 15 amounts to a violation of Section 1153(a) is whether that conduct tended to interfere with the free exercise of worker rights granted by Section 1152. Nagata Brothers, supra, tells us that denial of vehicular access to worker living areas constitutes such interference. Therefore Respondent violated Section 1153(a) as alleged in Paragraphs 13 and 14 of the complaint,[103/] in refusing to supply keys to permit access by automobile.[104/] However, access to

---

[102/] Lake Superior Lumber Corp., 70 NLRB 178, 197 (1946), enf. 167 F.2d 147 (6th Cir. 1948), cited in Nagata Brothers, supra, at p. 19.

[103/] Both Paragraphs 13 and 14 refer to facts alleged in Paragraph 10 (g).

[104/] The absence of interference with vehicular access at San Luis Rey and Bonsall does not prevent finding such -- (continued)

worker living areas is not a mandatory subject of bargaining; therefore Kawano's refusal to provide gate keys was not a refusal to bargain as alleged in Paragraph 16 and Paragraph 16 is dismissed to the extent it encompasses the allegations of Paragraph 10(g).

6. Refusal To Bargain Re Office Clerical Employees:

Paragraph 10(h) of the Second Amended Complaint alleges Respondent "Refused to bargain about agricultural employees in clerical and sales jobs."[105/]

The initial question is whether an unfair labor practice proceeding is the appropriate forum for litigating the question of whether the office clericals are agricultural employees. Unit placement is appropriately raised in representation proceedings and if so raised is not properly relitigated in unfair labor practice proceedings. Here, it does not appear that the Board has yet been asked to resolve the issue. The certification characteristically states that the Union is certified as the bargaining representative for Respondent's agricultural employees. Neither party has filed a petition seeking clarification of the bargaining unit.

Since the question of Respondent's refusal to bargain regarding such employees hinges upon their status as confidential employees and since the General Counsel lodged no objection to evidence adduced by Respondent seeking to establish such status, it is appropriate to decide the issue in this proceeding.

With respect to the allegations of Paragraph 10(h), I make the following:

Findings Of Fact: Respondent maintains offices at San Luis Rey Ranch in the same building as its packing shed. The building is located on a 10-acre portion of the ranch owned by Respondent.

The office staff consists of three clerical employees and an office manager who share a large room on the first floor of the building. The corporate officers have space on the second floor.

Respondent's business records as well as some personal records of Raymond Kawano are kept in the office and are accessible to each of the clerical employees.

[104/](continued)--interference at Santa Fe and Bonsall to be violative of the Act. "(A) violation of the Act does not have to be wholesale to be a violation." N.L.R.B. v. Puerto Rico Telephone Co., 357 F.2d 919 (1st Cir. 1961), cited with approval in Nagata Brothers, supra. at p. 2.

[105/]Since there is no evidence that any person but Fred Williamson, a supervisor or managerial employee, performs any sales functions, Paragraph 10 (h) is dismissed so far as it alleges a refusal to bargain about sales jobs.

None of the clericals participates in labor relations discussions among Company officers.[106] Since the Company does not have a grievance procedure for its employees, none of the clericals has had involvement in such matters.

Carole Stillwell, one of the clerical employees, testified that she has, on occasion, been present during discussions between Geerdes and Kawano regarding ALRB hearings in which the Company was involved, and has, on occasion, obtained from Company records information requested by Geerdes for use in such hearings. Stillwell also testified to being present on occasions during conversations between Geerdes and Kawano regarding contract negotiations with the UFW.

Stillwell has the job title "Computer Payroll Operator." Her main duties are as follows: making daily entries to the weekly payroll journal, making entries on individual employee compensation cards, preparation of a weekly payroll report from information contained in the payroll journal, preparation of the employees' W-2 forms, making bank deposits to the Company's general account,[107] preparation of employee payroll checks, and keeping the personnel records of each employee current. From time to time she types correspondence for Raymond Kawano.

The weekly payroll report which Stillwell prepares contains the following information: the total payroll for the week, a breakdown of the payroll by category of employee,[108] a breakdown by foreman of the number of employees in .the crew and the number of hours worked by crew members; the weekly shed pack-out broken down into pack by flats and by lugs; and the cumulative pack for the season to date.

Pat Basham is employed as Respondent's bookkeeper. Her principal duties are as follows: posting to the general ledger, preparation of the balance sheet, preparation of quarterly IRS returns, calculating the highway use tax and other taxes payable by Kawano, reconciliation of the bank statements, talking to workers and obtaining from them information relative to the filing of workers compensation claims, submitting reports regarding on-the-job injuries to Respondent's compensation carrier, and preparation of daily cost reports setting forth costs incurred in connection with specific operations, e.g., harvest costs.[109]

---

[106] estimony of Raymond Kawano.

[107] The banking function is shared with the other two office clericals; none is authorized to make withdrawals from the Company's account.

[108] The following categories of employees are set forth on the report: Office and Administrative, Field Payroll, Floor Help, Mechanic, Tractor Driver, Truck Driver, Casual Labor, Sorters, Packers and Floor Help. One class of Floor Help is a packing shed classification; the other covers a small group of miscellaneous employees .

[109] The preparation of daily cost reports was a practice commenced in January, 1979.

Basham is also charged with the responsibility for opening and distributing the mail and keeping a list of all Kawano vehicles subject to being licensed. She maintains a running balance of the product which is picked and packed and prepares a monthly summary of this information. The Company maintains records showing the daily product packed out by the shed.

She occasionally types letters for Raymond Kawano, Williamson and Mizushima concerning matters related to properties leased by Kawano. She has also typed correspondence directed to Respondent's corporate attorneys.[110/] She has had no involvement in the taking or typing of notes of labor negotiations.

Maria Gorin is employed as a Payroll Clerk-Receptionist. She spends approximately 5Q% of her time performing duties commonly classified as those of a receptionist, i.e., taking telephone calls and dealing with drivers making produce pick-ups. She also places outgoing calls for Ray Kawano and Mizushima.

Her principal payroll clerk type duties involve totaling the hours worked by each employee and giving that information to Stillwell who punches it into the computer and prepares the payroll checks.

From time to time during the course of performing her regular duties, she has overheard conversations between the Kawanos and their C.P.A. or their attorneys. This occurs when the conversations take place in the main office area in which Gorin and the other clericals work.

Since the office force is small, each employee is trained to perform the functions normally performed by others and to cover for an absent employee. Gorin, from time to time, assists Basham in the performance of her duties.

Conclusions: Respondent does not deny it has refused to bargain with respect to its three clerical employees. It asserts as an affirmative defense that it has no duty to bargain with respect to its clerical employees contending that each is a "confidential employee" and therefore not an agricultural employee within the meaning of Labor Code Section 1140.4(b).

The Board has held that the status of employees who do not perform actual farming tasks is dependent upon whether the tasks which they perform "are incident to or in conjunction with the employer's farming operation."[111/] The job functions of each of the clericals involved herein are clearly performed in conjunction with the Respondent's farming operations. Therefore, Respondent at all times has had a. duty to bargain with respect to clericals unless it can be established that they are "confidential employees" within the meaning of that term as it has evolved in cases decided under the National Labor

---

[110/] A firm other than Gary, Cary, Ames & Frye.

[111/] Dairy Fresh Products Co., 2 ALRB No. 55 (1976).

Relations Act.

The National Labor Relations Board test of a "confidential employee" is whether the person is acting in a confidential capacity to persons involved in the formation, determination, and effectuation of the employer's labor relations policies. West Chemical Products, 221 NLRB No. 45 ( ); B. F. Goodrich Co., 115 NLRB 722 (1956). The ALRB stated its approval of this standard in Prohoroff Poultry Farms, 2 ALRB No. 56 (1976).

Respondent concedes that none of the clerical employees formulates labor relations policy. Its argument rests upon the assertion that each is in a position "whereby (she) acquire(s) information concerning Respondent's labor relations."[112]

The National Labor Relations Board has stressed the requirement that a disputed employee's relationship with a person dealing in labor relations matters must be confidential:

> The mere handling of or access to confidential business or labor relations information is insufficient to render an employee "confidential," as the Board has defined the term. Instead, we look not to the confidentiality of information within the employee's reach, but to the confidentiality of the relationship between the employee and persons who exercise "managerial" functions in the field of labor relations.
>
> Ernst & Ernst National Warehouse, 228 NLRB 590, 591 (1977).

In an earlier case the National Labor Relations Board stated:

> It is well settled that employees who handle business and financial records including those which concern labor relations, are not confidential employees when they act in a relatively minor clerical capacity, have a minimum of discretion, and do not assist or act in a confidential capacity to persons who determine and effectuate labor relations.
>
> R. H. Macy & Co., 135 NLRB (1970).

[112] Respondent cites Moore-McCormack Lines, Inc., 181 NLRB 76 (1970); National Cash Register Company, 168 NLRB 130 (1968); and Triangle Publications Inc., 118 NLRB 595 (1957), in support of its contention.

None of the three office clericals has a. confidential relationship with Raymond Kawano, the management person involved with labor relations matters. His testimony suffices to support this conclusion. It is buttressed by the testimony of the disputed employees. Pat Basham's testimony contains nothing which would establish her as a confidential employee. Gorin stated that she had, from time to time, overheard conversations between Kawano and Geerdes. These conversations occurred in the general office area where Gorin was engaged in the performance of her customary duties. Presumably, anyone else present would have heard the conversations. There is no evidence to support the conclusion that in "overhearing" she was functioning in a confidential capacity.

Carol Stillwell comes closest to being a confidential employee. She has been present during discussions regarding contract negotiations between Geerdes and Kawano, but mere presence is not enough to warrant her exclusion from the unit. Respondent did not establish that she was present in a confidential capacity to Raymond Kawano.[113/]

Respondent has failed to establish that any of its office clerical employees is a confidential employee. It follows that Respondent has violated Section 1153(e) and Section 1155.2(a) by refusing to bargain with respect to said employees. Additionally, its failure to provide the Union with requested information regarding the wages, hours and conditions of work of said employees violated Section 1153(e).

Finally, Respondent's failure to provide the Union with an outline of the job functions of its clerical employees is unexplained. Respondent's bargaining representatives were persons sophisticated in. the area of labor law, and it is reasonable to conclude they understood the claim of confidential status was frivolous or at least subject to serious question. The failure to provide the facts requested by the UFW is circumstantial evidence that Respondent failed to bargain in good faith.

7. Refusal To Bargain Re Shed Employees:

Paragraph 10(i) of the complaint alleges that Respondent "Refused to Bargain (sic) about packing shed employees for more than a year following the UFW's certification as bargaining representative."

Respondent admits refusing to bargain regarding shed employees until June 12, 1978, at which time the UFW was recognized as the bargaining representative for shed employees.

Kawano's refusal to bargain rests upon its contention that the shed was a commercial operation and that shed employees were not agricultural employees within the meaning of Labor Code Section

---

[113/]See John Sexton & Co., 224 NLRB 1341 (1976); Victor Industries Corporation of California, 215 NLRB 48 (1974); cf. Siemens Corporation, 224 NLRB 1597 (1976).

1140.4(b).

The status of the shed employees has not previously been litigated in any representation proceeding. The Board, following its customary practice, certified the Union as the representative of all agricultural employees of the Employer. If any shed employees voted, they voted challenged ballots, and it was unnecessary to resolve the challenges. Neither party has filed a petition seeking unit clarification. Thus, the present situation is one in which the rule prohibiting relitigation of representation questions in an unfair labor practice case is inapposite.[114/]

Because Respondent regarded the shed as a commercial operation, it declined to bargain regarding the wages, hours and working conditions of shed employees. It also allegedly declined to furnish requested information regarding the wages and other conditions of shed employees, conduct which the General Counsel contends constitutes a violation of Section 1153(e) irrespective of whether the employees were agricultural employees. The General Counsel also contends that Respondent violated Section 1153(e) by failing to provide the UFW with facts supporting its contention that the shed was a commercial operation. Thus, the General Counsel presents three bases for urging that Respondent's conduct regarding the packing shed was a refusal to bargain: the actual refusal to bargain, the failure to furnish information enabling the UFW to determine whether the shed was "commercial," and the failure to supply wage and working condition information.

With respect to the allegations of Paragraph 10(i) and the allegations of Paragraphs 10 (b) and 10 (c) to the extent that those allegations relate to shed employees, I make the following:

Findings Of Fact: At San Luis Rey, Respondent owns a building which houses a packing shed and the corporate offices of Respondent. To the extent that Pacific Beauty can be said to have an office, it is located on this site.[115/]

Pacific Beauty has no office staff or office equipment. It utilizes the Kawano office force and the Kawano office equipment. For these services Pacific Beauty pays Respondent a monthly fee based upon the amount of packing done during the month.

Pacific Beauty has been in operation since 1968. It is currently engaged in the packing and sales of round tomatoes grown by Kawano. Prior to June, 1978, it packed round tomatoes for growers other than Kawano.[116/] In 1975, 20% of the total volume packed by shed

---

[114/]See Perry Farms. Inc., 4 ALRB No. 25, at p. 3 (1978).

[115/]Pacific Beauty is a separate corporation which performs packing and sales functions for Respondent.

[116/]The outside packing done during 1975-1977 was done for Pacific View and Vega.

employees was packed for outside growers. In 1976, 32% of the produce packed was packed for outside growers and in 1977, 23% was packed for outside growers. In 1978, 99% of the produce packed was Kawano produce. No packing was done for Pacific View and the shed packed for Vega only on the first two days of the tomato season.

Cherry tomatoes and other crops grown by Kawano are packed in an adjacent shed known as the cauliflower shed. It is only employees working £n the tomato shed who are at issue herein. Respondent at no time contended that cauliflower shed employees were not covered by the certification. Nor is it contended that Respondent refused to bargain with respect to such employees.

Tomato packing commences in June each year and runs into the following January. Respondent was unaware prior to the commencement of the 1978 packing season that neither Pacific View nor Vega were going to utilize the Kawano shed to pack their tomatoes. Such awareness came when Pacific View failed to bring tomatoes at the start of the 1978 season and when Vega ceased bringing tomatoes two days into the season.

Employees who work in the tomato shed do not customarily interchange with field workers or with cauliflower shed workers. There are occasions near the end of the tomato packing season when some tomato shed workers may divide their time between the tomato shed and the cauliflower shed. At the end of the tomato season there are some tomato shed workers who go to work in the cauliflower shed. Such workers are treated as new hires when they move to the shed.

Tomato shed employees are hired by David Kawano and Ron Mizushima, both of whom are employed by Respondent. David Kawano supervises the shed operation.

During 1977, packing shed employees received two pay-checks, one from Pacific Beauty to cover the work performed on tomatoes packed for the outside growers, and one from Kawano to cover the work performed packing Kawano's tomatoes. The separate payrolls were prepared by Kawano office employees using the Kawano computer.

Pacific Beauty and Kawano maintain separate bank accounts.

John Kawano, Frank Kawano and Ray Kawano are common shareholders in Kawano, Inc., and Pacific Beauty Company. John is President of both companies, and Ray is Secretary-Treasurer of both. Harry Kawano is the only additional shareholder of Kawano, Inc. Fred Williamson, Vice President, is the only additional shareholder in Pacific Beauty Company.

At the bargaining session of August 23, 1977, the UFW asserted that shed employees were agricultural employees and were part of the bargaining unit. When Respondent disagreed, the UFW demanded that the Employer present facts to support its conclusion. None were forthcoming at the meeting.
//

At the meeting of October 10, 1977, Respondent stated that its counterproposal was intended to cover only employee groups which had been eligible to vote in the representation election. Shed employees were not included in their proposal because they had not been eligible to vote. The UFW responded by saying that Kawano should supply information establishing the commercial status of the operation.

At the bargaining session of December 22, 1977, the UFW reiterated its position that shed employees were in the unit and requested that it be supplied with the same information regarding such employees as had been requested for field workers. Kawano again responded that shed workers had not been eligible to vote and were not in the unit.

Heumann's letter of January 24, 1978, to Geerdes renewed the UFW's demand for clarification of the status of shed employees.

At the meeting of February 1, 1978, Geerdes explained that shed employees had not been eligible to vote because they were not then Kawano employees. He said although shed workers were now Kawano employees they were not agricultural employees because the shed was a commercial operation. He also told Heumann that between 20% and 30% of the produce going through the shed was packed for Pacific View and Vega.

On April 3, the UFW again asked Kawano when the requested shed information would be forthcoming. On May 11, the UFW once more sought resolution of the shed worker issue.

On June 12 Kawano notified the UFW that its shed was no longer a commercial operation and stated that it recognized the UFW as the bargaining representative of those employees.

On July 28, Kawano supplied the UFW with the names and addresses of its shed workers. Respondent maintained records from which it was possible to determine the percentage of the total packed for growers other than Respondent. The records covered the 1975, 1976 and 1977 seasons. The parties stipulated that the records for June and July, 1977, were among the records available for UFW inspection as of October, 1977. Payroll records made available to the UFW in mid-July, 1977, included the shed employee records.

Conclusions:

A. Status Of The Shed Operation

(1) Single Employer. The linch-pin of the General Counsel's argument that Respondent unlawfully refused to bargain regarding tomato shed employees is the contention that Pacific Beauty and Kawano during the relevant period were separate employers, that the shed work performed on Kawano products was performed by Kawano employees and was work covered by the Act, while the work performed by the same employees on tomatoes packed for outside growers was work performed for Pacific Beauty and not covered by the Act, as being performed for a commercial shed operation. Thus, the General Counsel contends the fact situation here is controlled by the Board's decision in Joe Maggio, 4 ALRB No. 65 (1978).

However, if Kawano and Pacific Beauty are deemed to be a single employer, the crucial question is whether the shed is a commercial operation because a significant portion of its pack is grown by outside growers. Joe Maggio, supra, does not provide the answer to this question.

Respondent's refusal to bargain regarding shed employees was grounded on its belief the shed was a commercial operation and therefore shed employees were not agricultural employees. When it felt the shed was no longer commercial, it bargained. By bargaining for shed employees when it ceased outside packing, Kawano conceded that Kawano and Pacific Beauty are a single agricultural employer within the meaning of the Act.[117/]

The evidence supports the conclusion that Kawano and Pacific Beauty have had a common President, a common Secretary-Treasurer, a common shed manager, and a common shed crew that performed all tomato packing without regard for whether the work was being performed for Pacific Beauty or for Kawano. The packing was dong in the same shed and with the same equipment regardless of whether it was Kawano work or Pacific Beauty work. Both entities used the same office and had the same address. Ray Kawano set the wage scale for the shed employees, and the same rate was paid regardless of the entity for whom the work was being performed. To the extent the record reveals the existence of a labor relations policy, it appears there was a single policy, i.e., setting of wage rates and granting of wage increases for shed employees.

The only indicia that Respondent and Pacific Beauty are separate employers in terms of the Agricultural Labor Relations Act is the fact of separate bank accounts and separate payrolls. These facts are insufficient to overcome the above-cited indicia of common employer status.

The criteria used by the Board to establish such status in Louis Delfino Co., et al, 3 ALRB No. 2 (1977); and Perry Farms, 4 ALRB No. 25 (1978), are present here and mandate the conclusion that Kawano and Pacific Beauty constituted a single employer at all times material.

(2) Commercial Operation. We turn to the question of whether the shed was "commercial" during the seasons preceding the one which started in June, 1978. The Board's decisions in Carl Joseph Maggio. Inc., 2 ALRB No. 9 (1976); and Mr. Artichoke, Inc., 2 ALRB No. 5 (1976), are dispositive of the issue. In the former the Board held a shed employer engaged in packing produce grown by others was not an agricultural employer even when the proportion of product for outside I growers was small, citing Garin Co., 148 NLRB 1499 (1964), as National Labor Relations Board precedent for its conclusion. In Garin the

[117/] Respondent's concession does not suffice to establish Pacific Beauty and Kawano as joint employers and cannot be binding upon the Board. To hold otherwise would effect voluntary recognition of the UFW and would, if the facts did not support common employer status, establish an inappropriate unit.

National Labor Relations Board found shed employees to be nonagricultural employees when 15% of the total pack was for outside growers. In the instant case the uncontradicted evidence is that during each of the three seasons preceding 1978 in excess of 20% of the total pack was packed for outside growers. This volume is sufficient to establish shed workers as nonagricultural employees prior to the start of the 1978 harvest. Respondent had no obligation to bargain regarding shed employees prior to the start of the 1978 season; therefore, Respondent did not violate Section 1153 (e) by refusing to bargain as charged in Paragraph 10(i).[118/] The allegations of Paragraph 10(i) are dismissed.

Failure/Refusal To Furnish Shed Information--We turn now to the question of whether Respondent failed to furnish information from which the UFW could make a determination regarding the commercial status of the Kawano shed and, if so, whether such failure violated its obligation to supply relevant information necessary for intelligent collective bargaining. The question has two facets: the alleged failure to supply information which would enable the UFW to determine whether the shed was a commercial operation and the alleged failure to supply requested information regarding the wages and other conditions of shed employees. The General Counsel argues that Respondent failed to supply either category of information and that its failure amounts to a refusal to bargain as alleged in Paragraph 10(b) of the complaint.

Information which will enable the bargaining agent to reach a reach a conclusion or at least be better informed as to whether disputed classifications are within the scope of the certified unit is certainly relevant and necessary for intelligent performance as bargaining representative. This is no less true when the employer is asserting the employees are not agricultural employees than when the assertion is that the employees are subject to specific exclusions under the Act or under case law, e.g., supervisors or confidential employees. Nor does the fact that Respondent had no duty to bargain regarding shed employees prior to June, 1978, relieve it from the obligation to provide relevant information regarding shed operations. Curtiss-Wright Corp., Wright Aero Div. v. N.L.R.B., 347 F.2d 61, 69 (3rd Cir. 1965). The status of shed employees as agricultural or non- i agricultural employees is a mandatory subject of bargaining. Since the j status of shed employees rests initially on a determination regarding the commercial or agricultural nature of the shed, information pertinent to that determination is relevant.

[118/] Respondent witness Williamson testified credibly that Respondent was unaware prior to the start of the 1978 season that Pacific View and Vega were not going to utilize the Kawano shed. Thus, no issue arises as to whether Respondent had an obligation to bargain prior to the start of the 1978 season because of knowledge that the status of the shed employees was to change.

The UFW's demand that Kawano supply facts to support its contention the shed was commercial was made initially on August 23, 1977. In October records were available to the UFW which, if examined, would have enabled it to conclude that during June and July, 1977, the shed's operation was commercial. In supplying the pack-out records for the first two months of the 1977 season, Respondent partially met its duty to supply shed information. As noted above, it is unclear that the 1975 and 1976 records were also supplied. In view of the fact that the payroll records supplied for 1975 and 1976 covered shed employees, it is likely that the shed pack-out records for that period were also supplied. It does not appear there was any attempt at selectivity of records to be made available, rather the impression is that Kawano dumped all its records in Geerdes' office. The evidence and permissible inferences drawn therefrom support the conclusion that Respondent made available data from which the UFW could ascertain the commercial or agricultural status of the shed. Thus, Respondent met its duty to supply information. As noted above, the UFW did not review the records for some months after they were made available.

We turn now to an examination of Respondent's conduct regarding the issue of shed status in connection with the allegation that it engaged in surface bargaining. It does not appear that Respondent ever told UFW representatives there were records in Geerdes' office from which it could ascertain the volume of non-Kawano produce flowing through the shed. At the meeting in October when it presented counterproposals, Kawano stated the proposals did not cover shed employees because they had not been able to vote. When the UFW demanded evidence of the commercial character of the shed, Kawano representatives did not reveal that such information was or would be soon available to the Union in records in Geerdes' office.[119/]

At no time thereafter, although repeated requests were made by UFW negotiators, did Kawano advise the Union its shed records were available for inspection.

Its failure to do so whether stemming from the ignorance of its negotiator regarding what the records contained, a desire to keep the pot boiling or the mistaken notion that it had no duty to produce the facts manifests an absence of the good faith intent to reach a collective bargaining agreement which is required of an employer by Section 1155.2 (a). The described conduct is an element of the course of employer conduct pertinent to determining whether Respondent failed to bargain in good faith as alleged in Paragraph 10(a) and manifests an absence of good faith.

The General Counsel also argues that Respondent's failure to provide the UFW with information regarding the name, age, sex, date of birth, residence, social security number, job classification and date of hire of shed employees establishes a refusal to bargain in good faith. Respondent provided what information it possessed in the records made available to the UFW in July, 1977. The

---

[119/]The precise date on which shed records were available in Geerdes' office is not clear from the record.

sufficiency of that response with respect to field employees is discussed elsewhere and the conclusions reached are applicable here.

Shed employees were not agricultural employees prior to June, 1978; thus, information regarding their wages and related conditions was not presumptively relevant prior to June, 1978. Curtiss-Wright Corp., Wright Aero Div. v. N.L.R.B., supra. Therefore, the Union must demonstrate more precisely by reference to the circumstances of this case that the requested shed employee information was relevant. The General Counsel relies on Curtiss Brooklyn Union Gas Company,[120] and N.L.R.B. v. Rockwell Standard,[121] to establish relevancy. The reliance is misplaced. The rationale in each of the cited cases for finding non-unit employee wage information relevant was a history or felt danger of unit erosion by transferring unit work to non-unit employees. There is no evidence in the present record that tomato shed employees ever did field work. There could have been no reasonable apprehension of unit erosion by transferring field work to shed workers.

Since the UFW failed to establish the actual relevance of shed employee wage information for the period prior to June, 1978, to whatever extent Respondent failed or refused, prior to June, 1978, to supply the wage information, its failure or refusal did not violate Section 1153(e) or Section 1155.2(a) of the Act.

8. Proposal Of A Dual Wage Structure:

Paragraph 10(j) of the Second Amended Complaint alleges that Respondent refused to bargain in that, at the bargaining session of October 12, 1977, it proposed an unlawful dual wage structure for agricultural employees.

With respect to the allegations of Paragraph 10 (j), I make the following:

Findings Of Fact: For an indeterminate period prior to October 12 it was Respondent's practice to pay its documented workers at a higher hourly rate than paid to undocumented workers.[122] At the meeting of September 28, 1977 (Meeting No. 4), the UFW spokesman charged Respondent with proposing an illegal dual wage system. Respondent's spokesman denied the charge and asserted no such proposal had been made. He further stated that Respondent contemplated that any agreed upon wage rate for general workers would be applicable to all employees so classified.

---

[120] 220 NLRB 189 (1973).

[121] 410 F.2d 953 (6th Cir. 1969).

[122] In making this finding I take notice of the Board's opinion in Kawano. Inc., 4 ALRB No. 104 (1978), in which at Page 3 the Board states that ". . . legals' (documented workers) wages were higher than the wages of illegals (undocumented workers)."

At the meeting of October 12, 1977, Respondent, as part of its initial counterproposal to the UFW, made the following proposal:

> A. Existing minimum wage rates for existing classifications for the first year of the Agreement.
>
> B. Minimum wage rates for classifications for the second year of the Agreement shall be subject to negotiation during the twelfth month of the Agreement. ...
>
> C. Minimum wage rates for the classifications for the third year of the Agreement shall be subject to negotiation during the twenty-fourth month of the Agreement. . . .

The counterproposal was reviewed during, the course of the meeting, and the UFW spokesman raised no questions regarding its meaning.

At the meeting of February 1, 1978, the new UFW spokesman, Heumann, stated that the UFW considered a wage differential between documented and undocumented workers to be illegal. Heumann said it was something which he had been sent to San Diego to handle and asserted he would file a lawsuit if necessary. Geerdes replied that he preferred to handle such matters during the course of negotiations.

At the April 11, 1978, meeting, Respondent proposed an interim wage agreement providing for a base rate of $2.65 per hour for all field workers with less than six months' service and a rate of $2.90 per hour for those with more than six months' service. Respondent further proposed that, effective January 1, 1979, all field workers would be paid $2.90 per hour. Respondent said the $2.90 rate accorded with the minimum wage under the Fair Labor Standards Act as of January 1, 1979. The rate was to become effective only in the event the parties had not otherwise reached agreement on wages as of that time.

At the June 28, 1978, meeting, the UFW contended the proposal would have the effect of keeping all undocumented workers at the $2.65 rate because they would never get the six months' probationary period behind them. Geerdes said that time of service could be accumulated from year to year. He said the length of service could be established by Company records, and also suggested that service could be established through the employee himself. The UFW wanted the break-in period reduced to one month, contending that even this period would disadvantage the undocumented worker.

At the June 27 meeting, although Geerdes stated the Company's records showed that 35% of the workers would be eligible for the higher rata, the UFW remained firm on its position that the break-in period should be limited to 30 days. There was no contention that

a break-in rate was unlawful.

On July 31, 1978, Respondent proposed a rate of S3.00 per hour for all field help.

Conclusions: The General Counsel's argument in support of his contention that Respondent's wage proposal violated Section 1153(e) rests on two grounds: First, the proposal violated Civil Code Section 3369; second, that acceptance of the proposal would have required the UFW to breach its duty of fair representation. Neither argument is persuasive.

No authority is cited for the first proposition. The General Counsel points to no decision by a California court standing for the proposition urged.[123/] Research revealed none. A reading of the section makes it clear that it is totally inapplicable to the present fact situation. The absence of any real belief by the General Counsel in this argument is manifest in the fact that in a brief of 379 pages, seven lines are devoted to this argument.

The General Counsel's argument that acceptance of the proposal would have violated the Union's duty of fair representation is equally unpersuasive and manifests a. lack of understanding of the fair representation doctrine. In this regard it is noteworthy that the Union's prime objection to the proposal was the length of the break-in period. Respondent proposed. Had the Respondent accepted the UFW counterproposal that the lower rate be paid only for one month, its interim wage proposal would presumably have been accepted.

Finally, even if one were to assume that Respondent's interim wage proposal were unlawful, no authority is cited for the proposition that the mere making of such a proposal violates Respondent's duty to bargain in good faith. It is clear on this record there was no insistence upon acceptance of the proposal; Respondent's position was modified on July 31, 1978, when it proposed that all field workers receive $3.00 per hour.

The allegations in Paragraph 10(j) of the First Amended Complaint are dismissed.

9. Unilateral Piece Rate Increase For Shed Workers:

Paragraph 10(k) alleges that Respondent unilaterally increased the wage of tomato sorters (sic) in July, 1978. Respondent does not deny having effected the increase.[124/] It defends upon the ground that the granting of the increase was not a change in the conditions enjoyed by packers and contends to have refused the increase

---

[123/] If the General Counsel's premise were accurate, a substantial number of collective bargaining agreements in California providing lower rates for new or probationary employees would be unlawful.

[124/] The evidence establishes that packers rather than sorters were given the unilateral increase.

would have altered an understanding between the employees and the Company. The increase was granted at a time when the shed employees were admittedly agricultural employees and covered by the UFW's certification.

With respect to the allegations of Paragraph 10(k) I make the following:

Findings Of Fact: Tomato shed packers are paid on a piece rate basis.

Sometime during the first week of July, 1976, the packers learned from their acquaintances packing for other tomato sheds in the area that the Kawano piece rate was one-half cent per layer lower than the rate being paid by the other sheds. One morning that same week Kawano's packers declined to start work until Ray Kawano met with them. Garcia and Rozales, acting as spokesmen for the group, demanded a piece rate increase of one-half cent per layer to achieve parity with packers in other sheds in the area.

Kawano attempted, unsuccessfully, to explain that they were getting the same net amount as other packers because those packers had one-half cent per layer taken from their wages to pay the foreman's salary while no deduction was taken from the rate received by Kawano packers.

The packers continued to demand the one-half cent increase. Kawano agreed in order to avoid a work stoppage. He told the assembled packers that Kawano would pay the same rate as the other sheds, and when those sheds raised their piece rate, Kawano would match the increase. He told the group to notify the foreman when they learned of an increase at the other sheds.

As of the first pay period in July, 1978, Ocean View, Ukegawa and Nagata, other growers in the area having tomato sheds, raised the piece rate for their packers by one cent per layer. This was the first increase since July, 1976.

On Wednesday, July 5, 1978, Garcia and Rozales told Mizushima that the piece rate at Ukegawa had been increased by one cent per layer. They told Mizushima that the Kawano packers wanted the same increase. The same information and demand was also conveyed to David Kawano that day. Both Mizushima and David advised Raymond Kawano of the demand. His response to each was that he would think about it.

Mizushima spoke with Garcia and Rozales again on Thursday, the 6th. They told him that Raymond had already said that their rate would be increased when the rate went up at the other sheds. Mizushima relayed this information to Raymond who acknowledged that it was correct. He then directed Mizushima to have David notify the packers the next day that their rate would be raised by one cent per layer. They were so notified on Friday as they were leaving work.

Neither Garcia nor Rozales was aware when they made their rate demand that the UFW had been recognized as the bargaining

representative for shed workers.

Prior to granting the rate increase, Raymond made no attempt to ascertain the accuracy of the representation made by Garcia and Rozales regarding the increase.

The UFW was not informed that the increase was to be effected. Nor was the UFW apprised of the pre-existing agreement between Raymond and the packers.

On Friday, July 7, Respondent was served with a re-presentation petition filed by the Fresh Fruit & Vegetable Workers Union seeking an election before the ALRB for a unit of all shed workers. Raymond Kawano was unaware of the service until Saturday, the 8th.

Raymond made the decision to effect the rate increase without consulting John Kawano or Respondent's labor attorneys.

Conclusions: Assuming arguendo that the July, 1978, increase given packers was given pursuant to an agreement made with the packers in 1976, it is undenied that Respondent failed to give the UFW prior notification of the increase and that the UFW had no opportunity to discuss' the matter with Respondent before the increase was effected. Appropriate National Labor Relations Board precedent makes such employer conduct a violation of the Act. In a recent affirmation of this principle the National Labor Relations Board stated:

> We further find no merit to Respondent’s contention that by granting employees an 8 percent across-the-board wage increase it did not violate Section 8(a) (5) of the Act because the increase was the result of its semiannual review policy and was merely an attempt to maintain the status quo. As we found with respect to the wage increase Respondent granted on February 2, 1976, such unilateral actions are violative even when they are made pursuant to an established company policy, if they are taken without affording the representative an opportunity to bargain. Therefore, we find Respondent's granting of the wage increases without notification to or bargaining with the Union violated Section 8(a)(5) of the Act.
>
> Allis Chalmers Corp., 237 NLRB No. 45, 99 LRRM 1002 (1978); see also Chatham Manufacturing Company, 172 NLRB 1948 (1968); Phil-Modes, Inc., 162 NLRB 1435, 1439 (1967).

//

The cited cases require rejection of Respondent's status quo defense and make it unnecessary to consider other arguments raised by the General Counsel. Respondent violated Sections 1153 (a) and (e) of the Act by unilaterally granting its tomato shed packers an increase in their piece rates without notifying the Union in advance.

B. The Remedy.

Having found that Respondent Kawano failed and refused to bargain in good faith in violation of Section 1155.2 (a) and Sections 1153 (a) and (e) of the Act, I shall, pursuant to the provisions of Section 1160.3, recommend that Respondent be ordered to meet with the UFW, upon request; to bargain in good faith; and in particular to refrain from unilaterally changing employees wages or working conditions and from failing and refusing to furnish information relevant to collective bargaining as requested by the UFW to make whole its agricultural employees for the loss of wages and other economic benefits they incurred as a result of Respondent's unlawful conduct, plus interest thereon computed at 7% per annum. Adam Dairy, 4 ALRB No. 24 (1978).

Because Respondent manifested a continuing pattern of illicit conduct, I shall recommend that the make-whole remedy commence on June 29, 1977, the date upon which Respondent engaged in conduct which, in view of the totality of the circumstances, first constituted an unlawful failure and refusal to bargain in good faith, O. P. Murphy, 5 ALRB No. 63 (1979), and continue until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to contract or impasse.

Having found that Respondent's office clerical employees are agricultural employees within the meaning of Section 1140.4(b) of the Act, I shall recommend that Respondent be directed, upon request by the UFW, to bargain with respect to the wage and working conditions of such employees.

The complaint seeks an order requiring that Respondent reimburse the UFW for expenses incurred in negotiations. No argument in support of such remedy was set forth in General Counsel's brief. While Respondent has been found to have violated Section 1155.2(a) and Section 1153(e) of the Act, its conduct during the course of negotiations was not so outrageous or frivolous as to warrant the imposition of the UFW's costs of negotiation, particularly is this true in view of j the manner in which the UFW conducted itself during the course of negotiations. I shall not recommend this remedy.

I shall recommend dismissal of the complaint with respect to all allegations thereof in which the Respondent has been found not to have violated the Act.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

RECOMMENDED ORDER

Pursuant to Labor Code Section 1160.3, Respondent Kawano,

Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2 (a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees' wages or working conditions, by failing and refusing to furnish information relevant to collective bargaining at the UFW's request, or by failing and refusing to bargain regarding wages and working conditions of its office clerical employees.

(b) In any other manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole those employees employed by Respondent in the appropriate bargaining unit at any time between June 29, 1977, to the date Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

(c) Preserve, and upon request, make available to the Board or its agents for examination and copying all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice in conspicuous places on its property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all

agricultural employees referred to in Paragraph 2(b) above.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on Company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

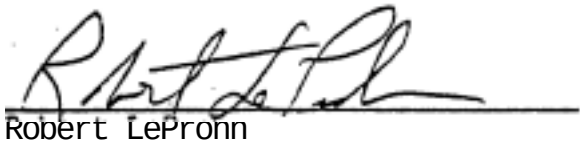
(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative for Respondent's agricultural employees, be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

IT IS FURTHER ORDERED that the allegations of the complaint with respect to which no violation of the Act was proved are dismissed.

Dated: January 7, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By 

Robert LePronn
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help any union;

3. To bargain as a group and to choose anyone they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect each other; and

5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT discharge or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed from June 29, 1977, to the date we began to bargain in good faith for our current contract, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

KAWANO, INC.

Dated: By _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE